01-783

No. _____

In The

Supreme Court of the United States

TOWN OF EAST HAVEN AND
EAST HAVEN BOARD OF EDUCATION,

Petitioners,

v.

NATIONAL ASSOCIATION FOR THE
ADVANCEMENT OF COLORED PEOPLE AND
NEW HAVEN BRANCH OF THE NAACP,

Respondents.

Supreme Court, U.S.
FILED
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**On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Second Circuit**

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

In this Title VII action, the district court found that the Petitioners had expressed their willingness to meet the Respondents' demands, except for payment of attorney's fees, before suit was brought, but that the Respondents brought suit instead "to achieve only a fee award." Accordingly, it reduced the Respondents' attorney's fee award to the amount incurred at the time the Petitioners indicated their willingness to meet the Respondents' substantive demands.

The United States Court of Appeals for the Second Circuit, relying on its holding in *Ortiz v. Regan*, 980 F.2d 138 (2nd Cir., 1992) reversed, finding that the district court had abused its discretion, and that it was improper for the district court to consider whether litigation was necessary to the achievement of the Respondents' goals in determining what attorney's fees were reasonable in relation to the result achieved.

Is the rule of the Second Circuit prohibiting consideration of whether litigation was necessary for the achievement of a Title VII plaintiff's substantive goals in determining a reasonable attorney's fee, a rule apparently in conflict with other circuits, consistent with the principles underlying this Court's decisions in *Hensley v. Eckerhart*, 461 U.S. 424 (1983) and *Farrar v. Hobby*, 506 U.S. 103 (1992)?

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PETITION FOR WRIT OF CERTIORARI

Petitioners respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above-entitled matter on August 1, 2001.

OPINIONS BELOW

The opinion of the Court of Appeals in this matter is reported at 259 F.3d 113 (2nd Cir., 2001), and is reprinted in the Appendix to this petition (App. 1).[1] The decision of the United States District Court for the District of Connecticut (Dorsey, J.) on the merits of the underlying action is reported at 998 F.Supp. 176 (D.Conn.,1998), and is reprinted in the Appendix to this petition at App. 39. The decision of the district court on the parties' cross-motions for attorney's fees is reported at 44 F.Supp.2d 422 (D.Conn.,1999), and is reprinted in the Appendix to this petition at App. 21.

JURISDICTION

In this action brought under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e, et seq.,

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[1] References in this petition appear as follows:

To the numbered pages of the Appendix to this petition: App.___.

To the numbered pages of the Joint Appendix filed in the Court of Appeals: J.A. ___.

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Respondents invoked the jurisdiction of the district court under 42 U.S.C. §2000e-5(f)(3), and 28 U.S.C. §§1331 and 1343.[2]

Following two trials in the district court, post-trial motions by both parties for attorney's fees, and the district court's issuance of a decision and supplemental judgment awarding the Respondents attorney's fees in the amount of $10,333.00, Respondents appealed to the Court of Appeals for the Second Circuit.

On August 1, 2001, the Court of Appeals issued its decision vacating the district court's supplemental judgment awarding attorney's fees, and remanding the case "for an award of costs and attorney's fees consistent with this opinion." 259 F.3d, at 115; App. 2.

Petitioners invoke the jurisdiction of this Court to review the judgment of the Court of Appeals pursuant to 28 U.S.C. §1254(1).

STATUTE INVOLVED

Title 42, United States Code, Section 2000e-5(k):

(k) Attorney's fee; liability of Commission and United States for costs.

In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee (including expert fees) as part of

[2] J.A. 35. (*Complaint*); J.A. 61 (*Amended Complaint*).

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the costs, and the Commission and the United States shall be liable for costs the same as a private person.

STATEMENT OF THE CASE

In 1988, the NAACP initiated a "Suburban Litigation Program."[3] The purpose of this program was to address low levels of black representation in public employment in suburban communities with largely white populations adjacent to cities with substantial black workforces.[4] In all or virtually all of the cases brought under this program, with the exception of the present one, the defendant municipality had ordinances or other formal preferences favoring the residents of that municipality over non-residents in consideration for public employment.

Commencing in 1988, attorneys for the Suburban Litigation Program investigated a number of municipalities, including the Petitioner Town of East Haven ("the Town"), as potential defendants. In 1989, the NAACP filed a charge of discrimination against the Town with the Equal Employment Opportunity Commission ("EEOC"), and on July 26, 1990, it received a right to sue letter.[5] This letter expired without suit being brought. In

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[3] J.A. 748, ¶ 10. The Respondents are the National Association of Colored People and the New Haven (Connecticut) Branch of the NAACP. They are collectively referred to herein as "the NAACP" or "the Respondents."

[4] *Id.*

[5] 44 F.Supp.2d. at 425; App. 23.

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April, 1992, the NAACP filed a second charge of discrimination with the EEOC, receiving a right to sue letter on February 23, 1993.[6]

In 1992 and extending into 1993, the NAACP and the Town engaged in correspondence and discussions regarding the NAACP's claims, and the Town's willingness to respond to them. On March 4, 1993, Attorney Stephanie Rones, on behalf of the NAACP, wrote to Michael Albis, East Haven's Town Counsel.[7] In her letter, Ms. Rones proposed settling what the NAACP regarded as its claims of municipal employment discrimination through a consent decree which would provide for the "adoption of an aggressive recruitment campaign encompassing radio advertising directed at the black communities in nearby cities."[8] Ms. Rones referenced a consent decree which she had previously provided Mr. Albis involving Fort Lee, New Jersey as a model. Mr. Albis responded by letter dated April 19, 1993. Mr. Albis noted that contrary to Ms. Rones' apparent belief, the Town had no residency ordinance or preference, that it had been actively recruiting outside the Town, and stated that "we have little in dispute and should be able to resolve this matter amicably."[9] Mr. Albis also stated that he did not think it appropriate to enter into a consent decree along the lines of those previously provided by Ms. Rones, because these had all involved municipalities with definite residency

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[6] *Id.*

[7] J.A. 28.

[8] *Id.*

[9] J.A. 30.

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preferences, while East Haven did not, and indeed had never had, such a policy or preference.[10]

On May 4, 1993, Ms. Rones responded by letter proposing an alternative to a consent decree. Ms. Rones stated:[11]

> The NAACP would be inclined to settle this matter without filing suit if the Town of East Haven agreed to the following: (1) do expansive recruitment on radio stations directed towards black listeners; (2) make the agreement public; (3) allow the NAACP to go promptly to federal court, if after joint discussions, we decide the Town is not complying with the terms of the agreement and lastly; (4) reimburse us for expenses, including attorneys [sic] fees.

Mr. Albis replied to Ms. Rones by letter on May 7, telling her that he had forwarded her proposal to the appropriate Town officials and would get back to her with their response.[12] Mr. Albis also stated:[13]

> However, apart from any other issues, I must state at this time that I do not see any basis for the Town agreeing to pay any expenses, such as attorneys [sic] fees at this time. Our consistent position has been that the Town is not engaging in any discriminatory preference in favor of local residents, and we have produced documentary evidence in support of that position. In short, the Town does not feel that you

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[10] *Id.*

[11] J.A. 32.

[12] J.A. 33.

[13] *Id.*

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would have prevailed in your claim of discrimination had suit been filed, and therefore I do not expect the Town to be willing to pay for any expenses which the NAACP may have incurred for such a suit.

As Mr. Albis testified at trial:[14]

> Q: All right. Now, although [Mr. Albis's May 7 letter] doesn't say so expressly, you had indicated to her, sir, as you already testified, that as far as the other conditions were concerned, namely an agreement that they could come to court if they didn't think the Town was living up to its agreement, extensive advertising and a public settlement, you had told her orally that you agreed –
>
> **Mr. Rose:** Excuse me.
>
> **Mr. Keefe:** Excuse me. Let me just finish the question.
>
> Q: You told her, in essence, the Town agreed to those?
>
> A: The only area where I informed her I thought there would be any problem would be in the legal fee area. The other things were all items that the Town had been doing all along and that I had agreed in previous conversations I did not think would be a problem.
>
> Q: Okay. Now, Mr. Albis, what was her response to your [letter of May 7]?
>
> A: The next contact that I received from the NAACP after that letter was delivered to them

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[14] J.A. 798-99.

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> was the filing of the lawsuit about two weeks later by the NAACP.
>
> Q: Were you surprised?
>
> A: I was surprised. I thought we were very close to a settlement and just had minor issues to work out, other than the legal fee arrangement, which I didn't expect to be the stumbling block to the settlement.

Having thus terminated settlement discussions following Mr. Albis's expression of resistance to the Town's payment of pre-suit attorney's fees, the NAACP commenced this action on May 21, 1993. Respondents invoked the jurisdiction of the district court under 42 U.S.C. §2000e-5(f)(3), and 28 U.S.C. §§1331 and 1343. In pertinent part, the complaint alleged that the Town had "in the recent past" enforced a policy of preferring East Haven residents for municipal employment which had disproportionately excluded blacks from employment, had otherwise, in unspecified ways, refused to recruit and hire black employees on the same basis as whites, and had failed to adopt and employ "objective, valid and non-discriminatory hiring procedures."[15] The NAACP also alleged that it had "tried unsuccessfully to eliminate these practices through negotiation and settlement."[16] In November, 1993, the NAACP filed an *Amended Complaint*, which named a number of individuals whom it was alleged that the Town had discriminated against in hiring for Town employment.

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[15] *Complaint*, J.A. 37-38, ¶¶ 11-12.

[16] *Id.*, ¶ 13.

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Trial commenced in April, 1995, lasting approximately one week. The NAACP then sought to amend its complaint to add the East Haven Board of Education as a defendant,[17] and to add a claim that the tests used in hiring policemen and firefighters had racially disparate impacts. Over the Petitioners' objections,[18] the NAACP was allowed to amend its complaint accordingly, and a *Second Amended Complaint* was filed.[19]

The addition of the East Haven Board of Education as a party, and the NAACP's newly asserted claims regarding the testing of applicants for police and fire positions, resulted in an additional and extensive round of discovery, and a second phase of trial which began on May 1, 1997 and ended on June 2, 1997.

On March 25, 1998, the district court issued its *Memorandum of Decision*.[20] It rejected the Respondents' disparate treatment claims, finding that "[t]here was no

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[17] Respondents' initial complaint had mentioned the Board of Education, but had alleged, erroneously, that the Town's personnel system conducted hiring for both the Town and the school system. *See*, J.A. 37, ¶ 10. The purported five year pre-suit investigation had evidently failed to unearth the fact that, as a matter of Connecticut law, local school boards are distinct legal entities from the municipalities they serve, and that the East Haven Board of Education conducted its own recruitment and hiring. The East Haven Board of Education had never been named as a party in any charge of discrimination filed with the EEOC, and no right to sue letter had ever been issued with respect to it.

[18] J.A. 210.

[19] J.A. 222.

[20] 998 F.Supp. 176; App. 39.

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evidence of overt discrimination against blacks as a group, nor against a particular black in the selection of an employee for any position."[21] It found that the Town had no requirement or policy favoring the hiring of East Haven residents, and that the most recent employment roster showed that 25% of the Town's employees were non-residents.[22] It did not sustain Respondents' claim that the police and fire tests had an unlawful racially disparate impact,[23] and rejected their claims that alleged nepotism and political cronyism had excluded potential black employees.[24] In sum, the district court stated:[25]

> The Town hiring process has been shown to be facially neutral. The testing has not been shown to incorporate discriminatory practices or procedures. No favoritism deprived a black of an otherwise merited job. No black applicant was denied a teaching placement on the basis of race.

Nevertheless, the district court concluded that the statistical disparity between black representation in the regional metropolitan population, and the extremely low or non-existent black employment in the East Haven Town government and the Board of Education supported an inference of racial discrimination.[26] The discriminatory mechanism identified by the district court rested on a perception in the black community that the Town was

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[21] 998 F.Supp., at 182; App. 51.

[22] 998 F.Supp., at 178; App. 41-42.

[23] 998 F.Supp., at 181-82; App. 49-51.

[24] 998 F.Supp., at 182; App. 52.

[25] 998 F.Supp., at 185; App. 58-59.

[26] 998 F.Supp., at 186; App. 62.

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unwelcoming, if not actually hostile, that this perception had resulted in qualified black applicants shunning the Town as a potential employer, leaving a pool of applicants who, according to objective and racially neutral criteria, were not qualified and, consequently, were not hired.[27] While the court pointed to no municipal *conduct* causally connected to the perception of racial hostility, it held that "the Town has inadequately addressed its perception in the black community," and that a decree mandating "outreach to the black community by advertising and recruiting in a manner and to a degree that hopefully will elevate the number of qualified black applicants seeking Town employment" would "level the playing field in the mind of the black community."[28] On June 10, 1998, a remedial decree was entered.[29]

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[27] The district court's explanation for this perception rested largely on the facts that there was a "low percentage of black residents in the Town, nearly non-existent Town black employment, lack of black success in seeking Town employment, and the substantial number of hirees who were Town residents and/or had an affiliation with Town officials or political activists. . . . These factors, coupled with the undisputed dearth of qualified black job applicants, tend to confirm plaintiffs' claim of a black perception of being unwelcome in the Town." 998 F.Supp., at 186; App. 63-64. The district court did not mention the role played in creating this perception by the past and then-current presidents of the New Haven Branch of the NAACP who had used their positions to publicly and repeatedly portray the Town as racist, despite their acknowledgment that they lacked a factual basis for such statements. *See*, J.A. 596-599.

[28] 998 F.Supp., at 188; App. 66-67.

[29] The decree was unreported, but is reprinted at App. 79, et seq. The terms of the decree, to the extent pertinent to this petition, will be discussed below.

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Both parties thereafter moved for awards of attorney's fees, with the NAACP seeking $445,215 in fees, and $55,435 in costs.[30] The Town claimed that because the decree ordered it to do nothing of substance that it had not been doing pre-suit, it was the prevailing party. The district court rejected this claim, finding that the NAACP was the prevailing party as a matter of law because it had emerged from the litigation with a judicial decree affording it at least some of the relief it had sought.[31] Despite the determination that the NAACP was the prevailing party, and was thus eligible for an award of attorney's fees, the district court stated:[32]

> However, the inquiry does not end there. Before the suit was started, NAACP had in hand its objective of a greater public awareness of the availability of East Haven employment to blacks. The demand for attorney's fees was the sole unresolved issue when suit was brought. Five years of litigation, in which the NAACP achieved the formalization of a detailed outreach program to which East Haven claims it was essentially agreeable before litigation, resulted in the substantial legal fees sought. East Haven claims that their incurral was not reasonably necessary.
>
> As it has achieved a judgment within the relief sought in the complaint, NAACP is a prevailing party. However, its entitlement to attorney's fees is limited to reimbursement for services as were reasonably necessary to achieve the judgment.

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[30] 44 F.Supp.2d, at 431; App. 36.

[31] 44 F.Supp.2d, at 426-27; App. 26-27.

[32] 44 F.Supp.2d, at 425; App. 22-23.

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The court then reviewed the pre-suit negotiations between the NAACP and the Town, as discussed above, and found that the Town had been prepared to accede to three of the four pre-suit demands outlined in Attorney Rones' May 4, 1993 letter, balking only at the payment of pre-suit attorney's fees and costs. Drawing on its familiarity with the evidence offered concerning pre-suit negotiations and the Town's settlement position, which it characterized as "entail[ing] substantially all of the relief ultimately obtained,"[33] as well as on its familiarity with the terms of its own remedial decree, the district court characterized its decree as "essentially ordering items 1-3 of NAACP's May 4, 1993 letter, but with greater specificity,"[34] and as a formalization of "what was available in East Haven's willingness to modify its hiring practices as articulated in its responses to NAACP's pre-suit demands."[35] In light of these conclusions, the district court found that "the litigation hoped to achieve only a fee award,"[36] and that the appropriate measure of reasonable attorney's fees were those incurred "up to the point at which [the NAACP] secured its goals," in May, 1993.[37] Relying on the time records submitted by the NAACP in support of its fee application, the district court awarded

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[33] 44 F.Supp.2d, at 428; App. 31.

[34] 44 F.Supp.2d, at 426; App. 24.

[35] 44 F.Supp.2d, at 429; App. 31.

[36] 44 F.Supp.2d, at 431; App. 36-37.

[37] 44 F.Supp.2d, at 431; App. 37.

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$10,333 in fees, and $33.20 in expenses.[38] Respondents then appealed to the United States Court of Appeals for the Second Circuit.

By decision dated August 1, 2001, the Court of Appeals vacated "the district court's supplemental judgment and remand[ed] for an award of costs and attorney's fees consistent with this opinion."[39] Although the district court had not assessed the time records claimed by the NAACP to support its request for fees incurred over the course of the litigation, or the extent to which the time spent related to severable and unsuccessful claims, the Court of Appeals stated that the NAACP had "obtained excellent results and should recover a fully compensatory fee."[40] The Court of Appeals held that "the district court's decision was an abuse of discretion because it was premised on a clearly erroneous assessment of the record, or because it was inconsistent with our decision in *Ortiz v. Regan*, 980 F.2d 138 (2nd Cir., 1992), or both."[41]

On a factual level, the Court of Appeals construed the district court as having held that there was an actual and specific offer of settlement by the Town which met the NAACP's pre-suit settlement demands, excluding only the NAACP's claim for pre-suit attorney's fees and expenses. Reviewing the course of negotiations between

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[38] 44 F.Supp.2d, at 432; App. 38.

[39] 259 F.3d, at 155; App. 2.

[40] 259 F.3d, at 122; App. 19-20. Internal quotation marks omitted.

[41] 259 F.3d, at 118; App. 9.

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Attorneys Rones and Albis, discussed above, the Court of Appeals held that such a construction was clearly erroneous.

However, as the Court of Appeals noted, Petitioners did not claim that the pre-suit discussions between the parties had resulted in a concrete or detailed settlement offer, and readily conceded that no such agreement had actually been reached prior to the NAACP's termination of settlement discussions.[42] As Petitioners stated in the Court of Appeals:[43]

> Contrary to the [Respondents'] current claim, the [Petitioners] have never asserted, and the trial court did not hold, that the discussions between Attorneys Albis and Rones had *actually* culminated in any detailed or specific agreement as to the types of detailed provisions necessarily embodied in the contemplated pre-suit agreement or in a judicial decree. Rather, the trial court held that the Town was *willing* in 1993 to enter into such a detailed agreement, but that the [Respondents] decided instead to spurn the opportunity to achieve the substantive relief it desired in 1993 and instead to file suit because of the Town's stated reluctance to agreement to payment of presuit attorney's fees.

The Court of Appeals considered this reading of the district court's opinion "plausible,"[44] but held that, even given this reading, the district court's award of attorney's

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[42] *See*, 259 F.3d, at 119; App. 11-12.

[43] *Brief of the Defendant-Appellees*, p. 26. Emphasis in original.

[44] 259 F.3d, at 119; App. 13.

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fees constituted "an abuse of discretion because it would be contrary to our holding in *Ortiz v. Regan*, 980 F.2d 138, 140 (2nd Cir., 1992)." The Court of Appeals stated:[45]

> As we read *Ortiz*, the parties' closeness to settlement in informal negotiations, or a defendant's subjective "willingness" to reach an agreement . . . are, together or alone, insufficient grounds for declining to award attorney's fees incurred in subsequent litigation. Absent a showing of bad faith, a party's declining settlement offers should not operate to reduce an otherwise appropriate fee award.

Finally, the Court of Appeals held that even if the Town had fully and unequivocally accepted the NAACP's pre-suit demands "by making a Rule 68 offer of judgment accepting them after suit was filed, denial of fees would nevertheless have been improper because the relief ultimately obtained by the NAACP was superior in several respects to the NAACP's pre-suit demands."[46]

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[45] *Id.* Internal citations and quotation marks omitted.

[46] 259 F.3d, at 122; App. 18-19.

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REASONS FOR GRANTING THE WRIT

I. THE SECOND CIRCUIT RULE PROHIBITING CONSIDERATION OF WHETHER LITIGATION WAS REQUIRED TO ACHIEVE A PREVAILING PLAINTIFF'S DEMANDS IS IN CONFLICT WITH THE DECISIONS OF THE OTHER CIRCUITS TO CONSIDER THE QUESTION.

In *Ortiz v. Regan*, 980 F.2d 138 (1992), the Second Circuit adopted a rule prohibiting district courts from considering settlement offers, other than formal offers of judgment made pursuant to F.R.Civ.P. Rule 68, in determining what, if any fees should be awarded to a prevailing plaintiff seeking an award of attorney's fees under 42 U.S.C. §1988.[47] As the Court of Appeals stated in *Ortiz*:[48]

> A district court should not rely on informal negotiations and hindsight to determine whether further litigation was warranted and, accordingly, whether attorney's fees should be awarded. Otherwise, plaintiffs with meritorious claims may be improperly dissuaded from pressing forward with their litigation.

This rule as to post-suit settlement proposals was reaffirmed by the Court of Appeals in *Raishevich v. Foster*, 247

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[47] As the Second Circuit noted in its opinion, "[b]ecause the same standards are generally applicable in all cases in which Congress has authorized an award of fees to a prevailing party, we rely on precedents involving attorney's fees without regard to whether they involved Title VII or some other federal statute." 259 F.3d, at 117, n.5; App. 8. Internal quotation marks omitted.

[48] 980 F.2d, at 140-41.

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F.3d 337 (2nd Cir., 2001), and extended to pre-suit negotiations by its decision in this case.[49]

Other circuits which have considered whether a district court may properly consider a party's settlement posture, and whether that party's substantive objectives could have been achieved without litigation, have reached the opposite conclusion. In *Sheppard v. Riverview Nursing Center, Inc.*, 88 F.3d 1332, 1337 (4th Cir., 1996), *cert. den.*, 519 U.S. 993 (1996), the Fourth Circuit concluded that district courts "may consider a plaintiff's refusal of a settlement offer as one of several proportionality factors guiding their exercise of discretion. . . . "

The Respondents and the Court of Appeals in this case cite an earlier Fourth Circuit decision for the proposition that the Fourth Circuit rule is consistent with the *Ortiz* rule in the Second Circuit.[50] This claim is unfounded. In *Clark v. Sims*, 28 F.3d 420 (4th Cir., 1994), the Fourth Circuit reversed a district court attorney's fee award because it had erroneously held the defendant's settlement proposal to *be* a Rule 68 offer of judgment, when in fact the offer had been insufficiently formal to satisfy the terms of the rule.[51]

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[49] *See*, 259 F.3d, at 122; App. 18. ("*Ortiz's* prohibition against relying on informal negotiations and hindsight to determine whether future litigation was warranted and, accordingly, whether attorney's fees should be awarded . . . applied to post-suit negotiations in *Ortiz*, applies to pre-suit negotiations as well.")

[50] *See*, 259 F.3d, at 121, n.10; App. 18.

[51] *See*, 28 F.3d, at 423 ("The Clarks content that the district court erred in applying Rule 68 because the offer in question

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Other circuits have also correctly recognized that it is entirely appropriate to reduce or deny a prevailing plaintiff's attorney's fee award where that party has unreasonably or unnecessarily initiated or prolonged the litigation. *See*, e.g., *Stanton v. Southern Berkshire Regional School District*, 197 F.3d 574, 578 (1st Cir., 1999) (party not entitled to attorney's fees when he obtains result through litigation that he would have obtained without bringing suit); *State of New Hampshire v. Adams*, 159 F.3d 680, 686-87 (1st Cir., 1998) (district court finding that settlement equivalent to relief actually achieved "probably could have been reached without resort to litigation" defeats attorney's fee claim); *Vocca v. Playboy Hotel Co.*, 686 F.2d 605, 608 (7th Cir., 1982) (attorney's fees denied entirely because plaintiff unreasonably refused settlement offer slightly less than amount of ultimate settlement).[52]

The Respondents, and the Court of Appeals, cite the First Circuit decision *Coutin v. Young & Rubicam, P.R.*, 124 F.3d 331 (1st Cir., 1997) for the proposition that a prevailing plaintiff who recovers more than the amount of a settlement offer may not have their fee award reduced on the ground of "limited success," and claim that the present Respondents similarly received more by judgment than the Town offered pre-suit.[53] This analysis is

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was not sufficiently formal to constitute an 'offer of judgment' under Rule 68. We agree.")

[52] It appears that the 11th Circuit as well permits a district court to consider a prevailing plaintiff's position in relation to settlement when exercising its discretion as to an award of attorney's fees. *See, Canup v. Chipman-Union, Inc.*, 123 F.3d 1440, 1444-45 (11th Cir., 1997).

[53] *See*, 259 F.3d, at 122; App. 18-19.

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flawed. First, *Coutin* pre-dated the First Circuit decisions in *Stanton v. Southern Berkshire Regional School District*, 197 F.3d 574 (1st Cir., 1999) and *State of New Hampshire v. Adams*, 159 F.3d 680 (1st Cir., 1998), discussed above, both of which held that attorney's fees could be denied if the result obtained through litigation was available to the party without litigation.

Second, *Coutin* involved a situation where the plaintiff received a money damage award of $45,538, as against the defendant's offer of $15,000. There is no question that Ms. Coutin received a great deal more through litigation than was available to her through settlement.[54] By contrast, the district court in this case found that its decree amounted to nothing more than the formalization of terms to which the Town had indicated it was willing to agree pre-suit.

Third, the Town can scarcely be faulted for having failed to agree pre-suit to demands which were not even presented to it, e.g., relief as to the Board of Education or concerning the validation of employment tests.[55]

District courts as well, including some within the Second Circuit prior to *Ortiz*, recognized that a party's needless initiation or pursuit of litigation could justify denial or reduction of attorney's fee awards. *See*, e.g., *Naprstek v. City of Norwich*, 433 F.Supp. 1369, 1371

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[54] 124 F.3d, at 336.

[55] The mileage Respondents attempt to derive from the constant mutation of their claims over five years of litigation will be further discussed below.

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(N.D.N.Y., 1977) (attorney's fee denied prevailing plaintiff because "Congress did not intend to reward attorneys for burdening federal courts with unnecessary litigation when they have not even attempted to remedy their client's grievances by talking out their differences."); *Clay v. Harris*, 583 F.Supp. 1314, 1320 (N.D.Ind., 1984) (attorney's fees denied where plaintiff had been offered "substantially all the legal relief which he might expect in the suit," but nevertheless continued the litigation); *E.E.O.C. v. Nutri/System, Inc.*, 685 F.Supp. 568, 577-78 (E.D.Va., 1988) (unreasonable settlement posture may justify reduction or denial of attorney's fees).

Because *Ortiz*, and its extension by the Court of Appeals' decision in this case is in conflict with the rule prevailing in other circuits, this Court should grant certiorari to resolve the conflict between the circuits.

II. THE SECOND CIRCUIT RULE PROHIBITING CONSIDERATION OF WHETHER LITIGATION WAS REQUIRED TO ACHIEVE A PREVAILING PLAINTIFF'S DEMANDS IS IN CONFLICT WITH THIS COURT'S DECISIONS.

In *Hensley v. Eckerhart*, 461 U.S. 424, 440 (1983), this Court held that "the extent of a plaintiff's success is a crucial factor in determining the proper amount of an attorney's fee award" under the fee-shifting statutes. In particular, a district court considering such a fee award must determine "whether the expenditure of counsel's time was reasonable in relation to the success

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achieved."[56] Further, in determining what constitutes a reasonable fee, district courts are to apply a market-based approach, i.e., prevailing parties are entitled to be compensated at market rates for time spent on claims as to which they prevailed, but only for such time as could reasonably and ethically be billed to counsel's private, fee-paying client. As the Court stated,[57] "[h]ours which are not properly billed to one's client also are not properly billed to one's adversary pursuant to statutory authority."

In *Farrar v. Hobby*, 506 U.S. 112, 114-15 (1992), this Court held that a plaintiff who achieved merely nominal or technical success, while still a prevailing party and thus eligible for an attorney's fee award, might justifiably be denied an award of attorney's fees, or be awarded reduced fees, because the fees sought were not reasonably related to the result obtained.

In this case, the district court, having reviewed the documentary evidence and heard testimony from the Town's attorney, correctly held that the Town was willing to accede to all of the NAACP's substantive pre-suit demands, and that the NAACP elected to terminate settlement discussions and proceed to litigation solely because the Town had indicated its resistance to paying the NAACP's pre-suit attorney's fees. The Court of Appeals did not find these conclusions erroneous, but instead held that, under the *Ortiz* rule, they could not justify a reduced fee award. The question presented,

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[56] 461 U.S., at 436.

[57] 461 U.S., at 434.

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therefore, is whether *Ortiz* can be squared with the principles underlying *Hensley* and *Farrar*, i.e., whether an award of fees and costs exceeding $500,000 would be "reasonable in relation to the success achieved" when that result was available through settlement more than five years before the judgment embodying it entered, and at a time when accrued attorney's fees amounted to approximately five thousand dollars?[58]

Petitioners respectfully submit that the logic of *Hensley* and *Farrar* compel the conclusion that a district court not only *may*, but *must* consider whether, and to what extent, the litigation before it was necessary to the result achieved in determining whether to award attorney's fees and, if so, in what amount. A factual determination like that made by the district court here, i.e., that the litigation was wholly unnecessary to the achievement of the plaintiffs' substantive goals, necessarily means that the expenditure of counsel's time, not to mention the imposition on judicial resources, was unnecessary and, consequently, that the attorney's fees accrued in pursuing the litigation were both unnecessary and unreasonable. The correct view, and one completely consistent with the district court's actions, is that stated by the First Circuit in *State of New Hampshire v. Adams*, *supra*:[59]

> The prevailing party requirement is an incentive mechanism designed to encourage prompt resolution of meritorious claims and to discourage

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[58] *See*, 44 F.Supp.2d, at 429; App. 33.

[59] 159 F.3d, at 687.

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> unnecessary litigation. This policy rationale, evidenced in the [Supreme] Court's treatment of marginal victories, see *Farrar*, 506 U.S. at 115, and unrelated claims, see *Hensley*, 461 U.S. at 435, is served by declining to award fees when litigation yields only relief that in all probability was attainable without the time and expense of adversarial proceedings.

This Court should embrace this view and, consequently, should grant certiorari to reverse the decision of the Court of Appeals and affirm the district court's decision.

III. POLICY CONSIDERATIONS FAVOR THE RESULT REACHED BY THE DISTRICT COURT, AND ARE UNDERMINED BY THE DECISION OF THE COURT OF APPEALS.

Several significant policy considerations militate in favor of the result reached by the district court, and against that embodied in the decision by the Court of Appeals. First, Title VII is consciously and carefully structured so as to encourage resolution of disputes through mediation, conciliation, voluntary settlement and other avenues short of litigation. *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 44 (1974); *Firefighters v. Cleveland*, 478 U.S. 501, 515 (1986); *Johnson v. Transportation Agency*, 480 U.S. 616, 630 (1987). Equally clearly, there are strong policies discouraging the unreasonable and unnecessary waste of judicial and party resources. *See*, e.g., 28 U.S.C. §1927; F.R.Civ.P. Rule 11. These policies plainly support the district court's conclusion that where a party rejects and wholly fails to pursue their adversary's declared pre-suit willingness to meet the party's substantive demands,

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and instead initiates utterly unnecessary litigation merely to perfect or enlarge a claim to attorney's fees, the court is justified, and perhaps even compelled, to consider that fact when determining what amount of attorney's fees is appropriate.

The Court of Appeals expressed the view that the NAACP should not have received a reduced fee award because the decree which ultimately entered "was superior in several respects to the NAACP's pre-suit demands."[60] Such an analysis is flawed because it clearly tends to defeat the statutory preference for resolution of disputes prior to litigation by rewarding a party who fails to conduct an adequate pre-suit investigation or formulate pre-suit settlement demands which adequately address what it regards as the elements of its claims or damages.

In this case, the NAACP's purported five years of pre-suit investigation of the Town failed to discover that the Town did not have, and had never had, a residency ordinance or preference for municipal employees. It failed to discover that as a matter of Connecticut law, local school boards are distinct legal entities who conduct their own hiring and recruitment. It failed to raise any question in the NAACP's mind, or at least any question reflected in its pre-suit settlement demands, concerning the validity of the employment tests used for police and fire personnel. The fact that the decree ultimately addressed these issues is hardly a badge of virtue, but instead merely reflects the NAACP's failure to engage in

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[60] 259 F.3d, at 122; App. 18-19.

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a competent or meaningful pre-suit investigation, coupled with an almost constant mutation of its claims in the course of litigation as it progressively discovered that its pre-suit beliefs or theories were simply untrue or not legally viable.[61]

Second, the approach ratified by the Court of Appeals' decision promotes rather than discourages conflicts of interest between potential Title VII plaintiffs and their attorneys. As the district court found, the substantive relief sought by the NAACP was available to it in 1993. That relief, however, was not actually secured until 1998 because of the Town's expressed reluctance to pay the NAACP's then-accrued pre-suit attorney's fees. By permitting, and even encouraging, the substantive goals of a Title VII plaintiff to be held hostage to the attorney's interest in receiving a fee, the Court of Appeals has sanctioned an incentive structure which neither advances the Congressional goals underlying Title VII and the

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[61] The Court of Appeals is also mistaken in its statement that attorney's fees were warranted because the NAACP eventually "obtained a judicial decree, which the Town had explicitly rejected." 259 F.3d, at 122; App. 19. What the evidence showed was that the Town had expressed resistance to entering into a consent decree "such as the samples which [the NAACP had] provided," all of which involved cases where there was a municipal residency ordinance or formal residency preference, circumstances inapplicable to the Town. *See*, J.A. 30. Additionally, the Court of Appeals ignores the fact that the NAACP itself abandoned its pre-suit demand for a consent decree, offering to settle the case for a publicly acknowledged agreement concerning advertising for municipal positions. *See*, J.A. 32.

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many other federal fee-shifting statutes, nor affords primacy to the strong policies favoring the prompt and inexpensive achievement of a remedy when one is called for.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully Submitted,

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App. 1

United States Court of Appeals,
Second Circuit.

NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, and New Haven Branch of the NAACP, Plaintiffs-Appellants,

v.

TOWN OF EAST HAVEN, and East Haven Board of Education, Defendants-Appellees.

No. 99-7525.

Argued Feb. 22, 2001.
Decided Aug. 01, 2001.

Eric P. Smith, Lynch, Traub, Keefe & Errante, P.C. (*Hugh F. Keefe*, of counsel), New Haven, CT, for Defendants-Appellees.

David N. Rosen, Rosen & Dolan, PC (*David L. Rose & Joshua N. Rose*, Rose & Rose, of counsel), New Haven, CT, for Plaintiffs-Appellants.

Before *MESKILL*, *PARKER*, and *SACK*, Circuit Judges.

SACK, Circuit Judge:

Plaintiffs National Association for the Advancement of Colored People and the New Haven Branch of the NAACP (collectively, the "NAACP") appeal from a Supplemental Judgment on Attorney's Fees entered on March 23, 1999 by the United States District Court for the District of Connecticut (Peter C. Dorsey, *Judge*). On post-judgment motions, the district court ruled that the

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NAACP was entitled to attorney's fees[1] as the prevailing party in its suit against the Town of East Haven and the East Haven Board of Education pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e et seq. The court restricted the award, however, to reimbursement of fees for work performed prior to the NAACP's receipt of a pre-suit letter from counsel for the Town in the course of correspondence about possible settlement terms. *See NAACP v. Town of East Haven*, 44 F.Supp.2d 422 (D.Conn.1999) ("*NAACP II*").[2] In the view of the district court, the letter as amplified by the testimony of the Town's lawyer indicated that the NAACP could have achieved its objectives through settlement without filing suit. The court therefore held that the NAACP should not recover fees and costs incurred in litigation initiated after the letter was received. *See id.* at 428-31. We conclude that this decision constituted an abuse of the district court's discretion. We therefore vacate the district court's supplemental judgment and remand for an award of costs and attorney's fees consistent with this opinion.

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[1] Although the fees sought in this case are for multiple attorneys, we refer to them in the singular possessive, "attorney's fees," because that is the term used by Title VII in providing for such awards.

[2] There have been several opinions rendered during the course of this litigation, including one in this Court relating to a motion for a preliminary injunction restricting Town hiring of police officers and firefighters. *See NAACP v. Town of East Haven*, 70 F.3d 219 (2d Cir.1995). Only two are relevant to this appeal: the district court's 1998 opinion on the merits, and its opinion of the same year on attorney's fees, from which this appeal is taken. We therefore define these two opinions in the text of this opinion as "*NAACP I*" and "*NAACP II*," respectively.

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BACKGROUND

The NAACP's "Suburban Litigation Program" seeks to address perceived pockets of employment discrimination arising largely from municipal hiring preferences given to residents of primarily white towns that have a large minority workforce available nearby.[3] In 1988, the NAACP began to consider East Haven, among other Connecticut towns, for inclusion in the program. The Town did not have a formal resident hiring preference. As the district court later found, though,

> [t]he Town [then] employ[ed] 200 full time, 26 part-time and 83 seasonal persons. On the last roster, 25% were residents of towns other than East Haven, and 75% were Town residents. . . . According to its Equal Employment Opportunity reports from 1983 through 1996, the Town employed no blacks. The first black was hired [after the lawsuit was begun] in February 1997, as Welfare Director.

NAACP v. Town of East Haven, 998 F.Supp. 176, 178 (D.Conn.1998) ("*NAACP I*"). By contrast, blacks composed 17.7% of the work force of private employers that reported relevant statistics to the EEOC and that were located in the two zip code areas in which East Haven is situated. *See id.* at 179.

The NAACP sought to remedy the stark under-representation of blacks in the municipal workforce through a consent decree providing for an aggressive recruitment

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[3] As of November 2000, according to the NAACP, the program had resulted in negotiated consent decrees in eighteen cases, and the NAACP had prevailed in litigation in four others.

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program that would include radio advertising targeted at a black audience in neighboring communities. The Town opposed such a decree on the grounds that it had no resident hiring preference and that it already had a program in place to recruit employees from outside East Haven.

In 1990, contemplating a Title VII suit against East Haven, the NAACP sought and received a right-to-sue letter from the Equal Employment Opportunity Commission ("EEOC").[4] The letter expired, however, without the NAACP instituting litigation against the Town.

In October and November 1992, Stephanie Rones, an assistant general counsel of the NAACP, sought without success to open settlement negotiations with East Haven through its outside counsel, Michael A. Albis. On February 23, 1993, therefore, the NAACP obtained a second right-to-sue letter from the EEOC with respect to its claims. Nine days later, on March 4, Rones again contacted Albis in order to explore the possibility of a settlement.

On April 19, Albis responded by writing that he had discussed the matter further with Town officials. He stated that the Town "intend[ed] to continue the recruitment practices which it ha[d] developed over recent years to attempt to attract qualified applicants, including minority applicants, from outside the geographical boundaries of the town." He insisted, however, that

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[4] A right-to-sue letter is a prerequisite to bringing a Title VII suit. *See* 42 U.S.C. § 2000e-5(f); *Francis v. City of New York*, 235 F.3d 763, 768 (2d Cir.2000).

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because the Town had no hiring policy that was preferential toward Town residents, a consent order like those entered into between the NAACP and other municipalities was neither "necessary [n]or appropriate." He indicated his interest, however, in continuing to explore the possibility of settlement.

Rones answered Albis by letter dated May 4, 1993. She wrote that a lawsuit and a consent decree could be avoided if the Town agreed to several conditions, including an "expansive" recruitment effort with radio advertising, and reimbursement of the NAACP's costs and attorney's fees.

Albis responded by letter of May 7. The complete text of the letter reads:

> Dear Attorney Rones:
>
> Thank you for your letter of May 4, 1993. I have forwarded your proposal to the appropriate officials of the Town of East Haven for their review, and I will advise you of their response.
>
> However, apart from any other issues, I must state at this time that I do not see any basis for the Town agreeing to pay any expenses such as attorneys fees at this time. Our consistent position has been that the Town is not engaging in any discriminatory preference in favor of local residents, and we have produced documentary evidence in support of that position. In short, the Town does not feel that you would have prevailed in your claim of descrimination [sic] had suit been filed, and therefore I do not expect the Town to be willing to pay for any expenses which the NAACP may have incurred for such a suit.

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> In any event, I will advise as to the Town's position on the remaining points once they have had the opportunity to review your proposal with local officials. Thank you for your courtesy in this matter.
>
> Yours truly,
>
> Michael A. Albis

Rones did not receive the letter, apparently because she was working away from her office at the time. Unaware of its existence, she sent Albis another letter on May 12, 1993, warning that if the Town did not respond to her May 4 offer, the NAACP would file suit on May 21. Albis answered by faxing a second copy of his May 7 letter to Rones. Albis testified during the attorney's fees phase of the litigation that he informed Rones during this time period that "[t]he . . . things [demanded by the NAACP other than the payment of attorney's fees] were all items that the Town had been doing all along and that [he] had agreed in previous conversations [he] did not think would be a problem."

On May 21, having received no further reply from the Town and with two business days remaining before the expiration of its right-to-sue letter, the NAACP filed suit under Title VII on disparate treatment and disparate impact theories. The complaint sought an injunction requiring non-discriminatory employment practices, a vigorous recruitment program designed to attract black applicants in numbers that more closely reflect the proportion of blacks in the relevant labor market, and measures to remedy the present effects of past discrimination. No further effort to settle the dispute was made by either side.

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The ensuing litigation lasted more than five years. Although the NAACP was unable to prove the discriminatory intent on the part of the defendants necessary for it to sustain its disparate treatment claim, it prevailed at a bench trial on its disparate impact claim. *See NAACP I*, 998 F.Supp. at 186-88. The district court's post-trial decree requires the Town and the Board of Education, *inter alia*, to increase awareness of job opportunities through advertising directed to the black community and communications with black community organizations; to implement a formal system for monitoring, enforcing, and keeping records of hiring and recruitment efforts; to develop employment tests that comply with Title VII and the Uniform Guidelines for Employee Selection Procedures, 29 C.F.R. § 1607.4; to consult with independent testing agencies in selecting and administering such tests; and to refrain from using hiring preferences arising from residence, political affiliation, or collective bargaining provisions.

The NAACP then sought $445,215 in attorneys' fees and another $55,435 in litigation costs in connection with the completed proceedings. *See NAACP II*, 44 F.Supp.2d at 431. The defendants cross-claimed for approximately $250,000 in such fees and costs, claiming that they rather than the NAACP had prevailed. The district court ruled that the NAACP was a prevailing party entitled to attorney's fees and that neither of the defendants was. But the court excluded all claimed fees and costs incurred by the NAACP after May 1993 on the grounds that the Town had acquiesced in the NAACP's substantive demands at that time and that the NAACP could therefore have

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achieved its legitimate substantive goals through settlement and without litigation. The court therefore awarded the NAACP $10,333 in fees and $33.20 in costs accrued through May 1993 and in connection with the post-trial fee application itself. *See id.* at 431-32. On appeal, the NAACP challenges the amount of the award.

DISCUSSION

Title VII provides that "the court, in its discretion, may allow the prevailing party [in litigation under Title VII] . . . a reasonable attorney's fee . . . as part of the costs." 42 U.S.C. § 2000e-5(k).[5] We review a district court's award of attorney's fees for abuse of discretion. *See LeBlanc-Sternberg v. Fletcher*, 143 F.3d 748, 757 (2d Cir.1998). Despite this highly deferential standard of review, "[a] district court necessarily abuses its discretion if it bases its ruling on an erroneous view of the law or on a clearly erroneous assessment of the record." *Id.*

" '[T]he most critical factor' in determining the reasonableness of a fee award 'is the degree of success obtained.' " *Farrar v. Hobby*, 506 U.S. 103, 114, 113 S.Ct. 566, 121 L.Ed.2d 494 (1992) (quoting *Hensley v. Eckerhart*,

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[5] Because the same standards are "generally applicable in all cases in which Congress has authorized an award of fees to a 'prevailing party,' " *Hensley v. Eckerhart*, 461 U.S. 424, 433 n. 7, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983), we rely on precedents involving attorney's fees without regard to whether they involved Title VII or some other federal statute. *See also Bridges v. Eastman Kodak Co.*, 102 F.3d 56, 58 n. 1 (2d Cir.1996) (cases under 42 U.S.C. § 1988 are authoritative in Title VII attorney's fees context).

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461 U.S. 424, 436, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983)). The district court concluded that the NAACP was a prevailing party and that it had "achieved more than nominal success," thus making it eligible for attorney's fees. *NAACP II*, 44 F.Supp.2d at 428. With respect to the amount of the fee award, the district court noted that " '[w]here a plaintiff has obtained excellent results, his attorney should recover a full compensatory fee.' If a plaintiff obtains 'limited success, the district court should award only that amount of fees that is reasonable in relation to the results obtained.' " *Id.* at 428 (quoting *Hensley*, 461 U.S. at 435, 103 S.Ct. 1933) (citations omitted).

The district court found that the "NAACP could have achieved its objectives via settlement, with the possible exception of recovery of fees and costs." *Id.* at 431. It therefore concluded that the results achieved by the NAACP were not "excellent." *Id.* at 428. In calculating a "reasonable" fee in light of what the court saw as the NAACP's "limited success," the district court restricted the award of attorney's fees to work performed by NAACP lawyers prior to the date in May 1993 when, in the court's view, the matter should have been settled. *See id.* at 431-32. We conclude that the district court's decision was an abuse of discretion because it was premised on a clearly erroneous assessment of the record, or because it was inconsistent with our decision in *Ortiz v. Regan*, 980 F.2d 138 (2d Cir.1992), or both.

The district court's denial of fees in and after May 1993 was based in part on its findings that "in May, 1993, . . . East Haven met NAACP's substantive demands with respect to its hiring practices," *NAACP II*, 44

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F.Supp.2d at 431, that therefore "[t]he demand for attorney's fees was the sole unresolved issue when suit was brought," *id.* at 425, and that "the litigation [thus] hoped to achieve only a fee award," *id.* at 431. The record does not support those findings.

In Rones's November 30, 1992 and March 4, 1993 letters, she indicated that the NAACP's primary demand was an expanded, aggressive recruitment campaign including radio advertising directed to black residents of neighboring cities. She provided East Haven's outside counsel, Albis, with consent decrees from previous cases as examples of the kind of agreement the NAACP sought. Albis responded with an April 19 letter insisting that the Town had no resident hiring preference and that it was already recruiting applicants from outside of East Haven. Speaking for the Town, he said that it was not "appropriate" for the Town to enter into a consent decree similar to those that Rones had supplied. Albis then asked whether there were "*other* means whereby this matter can be settled" (emphasis added). Thus, despite expressions of a willingness to settle, Albis's April 19 letter provides no support for the district court's finding that the Town had met the NAACP's substantive demands. To the contrary, the April 19 letter states the Town's intention to "continue [its current] recruitment practices" and reflects no willingness to accede to the NAACP's primary demand of an expanded recruiting effort directed specifically to blacks.

East Haven continued to resist the NAACP's demands. Rones's May 4 letter to Albis listed four conditions for settlement: (1) "expansive [sic] recruitment on radio stations directed toward black listeners"; (2)

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"mak[ing] the agreement public"; (3) "allow[ing] the NAACP to go promptly to federal court, if after joint discussions, we decide the Town is not complying with the terms of the agreement"; and (4) reimbursing the NAACP for "expenses including attorneys fees." The letter also stated: "If these terms seem acceptable to your client, please let me know and we will draft an agreement incorporating the aforementioned terms."

Albis responded with his May 7 letter, set forth in full above. It flatly rejected Rones's insistence on the payment of the NAACP's attorney's fees. And it took no position on the remaining terms, stating that the Town "will advise . . . on the remaining points" once the Town reviewed the proposal. We therefore cannot agree with the district court's characterization of this communication as "East Haven me[eting] NAACP's substantive demands with respect to its hiring practices," *NAACP II*, 44 F.Supp.2d at 431, or "East Haven acquiesc[ing] in an NAACP demand for a more extensive employment recruiting program reaching out to the black community," *id.* at 425, or the Town, through its lawyer, "inform[ing] NAACP Attorney Stephanie Rones that the town agreed to all of the items except attorney's fees which remained unresolved," *id.*

Albis's testimony also does not suggest that he and Rones entered into an agreement on behalf of their respective clients settling NAACP's substantive claims. Albis characterized the situation in early May 1993 as "moving closer to a settlement," not reaching one. Indeed, counsel for the defendants told us at oral argument that the defendants were "not claiming . . . that the Town had agreed" to the NAACP demands and conceded

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that he did not think "that factual finding [by the district court] is accurate." Audiotape of Oral Argument, February 22, 2001.

After the May exchanges, no further progress was made in the negotiations. The Town made no counter-offer. Neither did it subsequently "advise" the NAACP, as promised in Albis's May 7 letter, as to whether it accepted the NAACP's substantive demands.

The NAACP filed suit shortly thereafter, immediately prior to the expiration of its EEOC right-to-sue letter. The Town then aggressively defended the lawsuit without formally agreeing to any of the terms in the NAACP's May 4 letter or suggesting other terms for settlement. In light of these facts, we conclude that the district court's finding that the Town had agreed to all of the NAACP's demands except for attorney's fees was clearly erroneous. The court's denial to the NAACP of attorney's fees for work performed in and after May 1993 (other than work on the fee application) based on that finding was therefore an abuse of discretion.[6]

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[6] We neither express nor imply any opinion on whether the NAACP would have been able to recover attorney's fees incurred in litigation if the Town had actually agreed to all of the terms except attorney's fees. Resolution of that issue would depend in part on an analysis of the Supreme Court's recent decision in *Buckhannon Board and Care Home, Inc. v. West Virginia Department of Health and Human Resources*, 531 U.S. 1004, 121 S.Ct. 1835, 149 L.Ed.2d 855 (2001), holding that a party that achieves its desired result without securing a judgment or a court-ordered consent decree is not a prevailing party entitled to recover attorney's fees.

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The defendants urge us to adopt an alternative view of the district court's decision. Perhaps the district court, instead of finding that the Town had in fact agreed to all of the NAACP's terms, found only that the parties would have agreed on everything except attorney's fees if negotiations had continued. This would support the district court's finding that the NAACP brought suit solely for the purpose of obtaining those fees and that fees incurred during the course of that litigation should therefore not be reimbursed.

The defendants' reading of the district court's opinion is plausible. We conclude, however, that a denial of fees on this basis would also be an abuse of discretion because it would be contrary to our holding in *Ortiz v. Regan*, 980 F.2d 138, 140 (2d Cir.1992). As we read *Ortiz*, the parties' closeness to settlement in informal negotiations, or a defendant's subjective "willing[ness]" to reach an agreement, Appellees' Br. at 26, are, together or alone, insufficient grounds for declining to award attorney's fees incurred in subsequent litigation. "Absent a showing of bad faith, 'a party's declining settlement offers should [not] operate to reduce an otherwise appropriate fee award.' " *Ortiz*, 980 F.2d at 141 (quoting *Cowan v. Prudential Ins. Co. of Am.*, 728 F.Supp. 87, 92 (D.Conn.1990) (Winter, C.J., sitting by designation), *rev'd on other grounds*, 935 F.2d 522 (2d Cir.1991)); *see also Raishevich v. Foster*, 247 F.3d 337, 347 (2d Cir.2001) (holding that a district court abused its discretion by denying fees to a party "on the basis of that party's rejection of the court's [informal oral] settlement proposal, which was also rejected by his adversary"). If a district court were allowed to "rely on informal negotiations and hindsight

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to determine whether further litigation was warranted and, accordingly, whether attorney's fees should be awarded. . . . , plaintiffs with meritorious claims [could] be improperly dissuaded from pressing forward with their litigation." *Ortiz*, 980 F.2d at 140-41.[7]

The defendants, focusing on the words "absen[ce] . . . of bad faith" in *Ortiz*, argue that the district court's finding that "the litigation hoped to achieve only a fee award," *NAACP II*, 44 F.Supp.2d at 431, amounts to a finding of bad faith that justifies the district court's reliance on informal negotiations in deciding to reduce the fee award. The defendants suggest that this was the implicit holding of the district court, although the court neither used the term "bad faith" nor cited *Ortiz*.

We assume without deciding that filing suit solely to achieve a fee award constitutes bad faith. Even so, we have been pointed to, and ourselves find, nothing in the record on appeal to suggest bad faith on the part of the NAACP beyond its decision to file suit at a time when, in

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[7] The defendants argue that *Farrar v. Hobby*, 506 U.S. 103, 113 S.Ct. 566, 121 L.Ed.2d 494 (1992) undermines the vitality of *Ortiz*. But *Farrar* dealt only with an aspect of *Ortiz* not relevant here – whether an award of nominal damages is sufficient to support the provision of attorney's fees under 42 U.S.C. § 1988. *See Farrar*, 506 U.S. at 112-16, 113 S.Ct. 566 (holding that a plaintiff who wins only nominal damages is a prevailing party under § 1988 but that such a plaintiff should usually receive no fee). *Farrar* did not address *Ortiz*'s holding that informal negotiations should not be the basis for reduction or denial of fee awards absent a showing of "bad faith" – a holding that we recently reaffirmed in *Raishevich*, 247 F.3d at 347.

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the district court's view, settlement of the NAACP's substantive demands was within reach. Any finding of bad faith by the district court must therefore have been based solely on the court's view of the progress of informal negotiations among the parties and their counsel.

We hold that informal negotiations alone cannot establish bad faith for purposes of *Ortiz*. Otherwise, in attempting to limit fee awards, defendants could argue that informal negotiations in the run up to litigation show that the litigation was unnecessary and therefore in bad faith. Permitting such an argument to prevail would be precisely contrary to the purpose of *Ortiz:* to prohibit the use of informal negotiations as a basis for reducing fee awards in order to avoid just this sort of hindsight scrutiny of a litigant's tactical decisions that would "improperly dissuade[ ]" "plaintiffs with meritorious claims . . . from pressing forward with their litigation." *Ortiz*, 980 F.2d at 140-41.

Aside from our concern about the deterrence of meritorious suits, we think that as an evidentiary matter, it is unlikely that a finding of bad faith can be supported solely by evidence that the parties were close to settlement. Without some independent evidence of bad faith, a plaintiff's decision to file suit despite the closeness to settlement may well in most or all cases be a legitimate tactic to buttress its negotiating position.

We see nothing in the record on appeal to suggest otherwise with respect to the litigation before us. The NAACP was faced with an expiring right-to-sue letter and an absence of agreement on any of its substantive demands. The district court suggested that the Town's

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expressions of its willingness to settle short of litigation required the NAACP to let its right-to-sue letter expire while negotiations continued. *See NAACP II*, 44 F.Supp.2d at 430. But there is no legal principle of which we are aware that requires a party to continue to negotiate a settlement of a claim rather than bring suit because the outlook for settlement is promising. The NAACP's institution of formal legal proceedings here is particularly understandable inasmuch as refraining from doing so would have placed the NAACP at a tactical negotiating disadvantage because of its loss of the benefit of its expiring right-to-sue letter. In the face of the Town's failure to respond definitively to the NAACP's offer of settlement and the imminent expiration of its right-to-sue letter, the NAACP's decision to file suit was perfectly reasonable.

Giving "additional weight" to our holding in *Ortiz* was the availability of Federal Rule of Civil Procedure 68,[5] which "permits a party defending against a claim to make a settlement offer and thereby avoid any liability for costs, including attorney's fees, incurred after the making of the offer." *Ortiz*, 980 F.2d at 141. The Town

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[5] Federal Rule of Civil Procedure 68 provides in part:

> At any time more than 10 days before the trial begins, a party defending against a claim may serve upon the adverse party an offer to allow judgment to be taken against the defending party for the money or property or to the effect specified in the offer, with costs then accrued. . . . If the judgment finally obtained by the offeree is not more favorable than the offer, the offeree must pay the costs incurred after the making of the offer.

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made no such offer in this case. The district court concluded, however, that *Rule 68* is inapplicable because no suit was pending at the time of the negotiations. *See NAACP II*, 44 F.Supp.2d at 430. But the unavailability of Rule 68 *before* suit does not explain why, if it was prepared to settle the case and wished to avoid liability for further attorney's fees, the Town did not take advantage of Rule 68 *after* the suit had been commenced. East Haven "could have made a formal offer of judgment pursuant to Rule 68 but chose not to use this procedure." *Ortiz*, 980 F.2d at 141.[9]

Because the Town never made any kind of offer – either before or after the lawsuit was commenced – and never responded definitively to the offer from the NAACP, we need not decide whether pre-suit settlement offers can ever preclude liability for attorney's fees incurred thereafter and, if so, the degree of formality

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[9] The defendants argue that Rule 68 is unworkable in cases seeking complex, conduct-oriented remedies because of the practical difficulty of comparing the relief awarded and a pre-judgment offer. They cite no authority for their argument, and nothing in the Rule suggests that it applies only to cases seeking damages or other relief amenable to simple comparisons. Indeed, the Seventh Circuit has noted that although "Rule 68 offers are much more common in money cases than in equity cases, . . . nothing in the rule forbids its use in the latter type of case." *See Chathas v. Local 134 IBEW*, 233 F.3d 508, 511 (7th Cir.2000) (collecting cases). Whatever practical difficulties there may be in applying Rule 68 in cases involving complex relief, they do not hinder us in this case because the Town never made an offer of any kind. Moreover, those practical difficulties militate in favor of requiring more formality than the indefinite expressions of a willingness to settle upon which the defendants urge reliance in this case.

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required for such offers.[10] For purposes of this case, it suffices to hold, as we now do, that *Ortiz*'s prohibition against relying on "informal negotiations and hindsight to determine whether future litigation was warranted and, accordingly, whether attorney's fees should be awarded," *id.* at 140, applied to post-suit negotiations in *Ortiz*, applies to pre-suit negotiations as well.

In sum, we conclude that there was no Town offer on the table in May 1993 when the NAACP decided to institute this litigation. And the NAACP was not required to make that decision amidst ongoing negotiations based on a guess as to whether six years later a district court would find that the negotiations would have been fruitful had they continued. A plaintiff, concerned that a court will refuse its claim for legal fees after successful litigation because the court concludes that pre-litigation negotiations probably would have succeeded, will likely decide whether to bring suit based on that fear rather than its best judgment.

Finally, we note that even if the Town had agreed to the NAACP's substantive pre-suit demands by making a

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[10] The Fourth Circuit has held that "[o]ffers of compromise made before suit is filed do not fall within [Rule 68]" and therefore "may not 'relieve [a] defendant from the payment of the costs of the action.' " *Clark v. Sims*, 28 F.3d 420, 424 (4th Cir.1994) (quoting 12 Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure: Civil* § 3003 (1973)); *see also Cox v. Brookshire Grocery Co.*, 919 F.2d 354, 358 (5th Cir.1990) ("A defendant's offer of compromise before the commencement of an action is not an offer under Rule 68, and therefore [the defendant's] higher settlement offer does not preclude an award of fees to [the plaintiff's] attorneys.").

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Rule 68 offer of judgment accepting them after suit was filed, denial of fees would nevertheless have been improper because the relief ultimately obtained by the NAACP was superior in several respects to the NAACP's pre-suit demands. First, the NAACP obtained a judicial decree, which the Town had explicitly rejected. Second, the NAACP obtained relief against the Board of Education, which was not involved in the pre-suit negotiations. Third, the decree requires reforms in the Town's testing and selection process, an issue that was not a subject of the negotiations. Fourth, the decree requires the Town to implement a formal system for monitoring, enforcing, and keeping records of hiring and recruitment efforts. Thus, the Town's "agreement" to the NAACP's pre-suit demands would not justify the denial of fees in prosecuting this litigation, which achieved significantly more than would have been available through settlement had it been based on the demands with which the Town had "no problem." *See Coutin v. Young & Rubicam P.R.*, 124 F.3d 331, 341 (1st Cir.1997) ("[I]t is a mistake of law to reduce an award of attorneys' fees in a civil rights case in response to a plaintiff's rejection of a defendant's settlement offer when the subsequent judgment exceeds that offer.").

Insofar as the district court found that the Town had agreed in substance to the NAACP's pre-suit demands, then, the finding was clearly erroneous. Insofar as the court relied on informal negotiations to deny attorney's fees, that reliance was contrary to our holding in *Ortiz*. The NAACP was awarded virtually all of the relief it sought in its complaint, and in some respects more. It therefore obtained "excellent" results and "should

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recover a fully compensatory fee." *Hensley*, 461 U.S. at 435, 103 S.Ct. 1933.

CONCLUSION

For the foregoing reasons, we vacate the district court's supplemental judgment and remand for an award of attorney's fees consistent with this opinion.

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United States District Court,
D. Connecticut.

NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE (NAACP), and New Haven Branch of the NAACP, Plaintiffs,

v.

TOWN OF EAST HAVEN, and East Haven Board of Education, Defendants.

No. Civ. 393CV1050(PCD).

March 22, 1999.

David N. Rosen, Rosen & Dolan, P.C., New Haven, Connecticut, *David L. Rose, Joshua Rose*, Washington, D.C., for plaintiffs.

Hugh F. Keefe, Lynch, Traub, Keefe & Errante, New Haven, Connecticut, for defendants.

RULING ON MOTIONS FOR ATTORNEYS' FEES

DORSEY, District Judge.

Currently pending are cross motions for attorneys' fees. As discussed below, plaintiffs' motion is granted and defendants' motion is denied.

I. *INTRODUCTION*

The parties move pursuant to 42 U.S.C. §§ 2000e *et seq.* Plaintiffs National Association for the Advancement of Colored People and New Haven Branch of the NAACP (collectively, "NAACP") initiated this action to remedy racial discrimination in the hiring practices of the defendants Town of East Haven and East Haven Board of

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Education (collectively, "East Haven"). NAACP claimed both discriminatory intent and disparate impact. No discriminatory intent as to specific employment was shown nor, in the final analysis, claimed. What was claimed and found proven was a disparate impact on hiring of blacks such that East Haven had but one black employee over a substantial period. Before the suit was started, East Haven acquiesced in an NAACP demand for a more extensive employment recruiting program reaching out to the black community. It articulated resistance to payment of legal fees. NAACP did not then attempt to negotiate a detailed agreement but unilaterally ended the discussion and filed the complaint. Following a bench trial, judgment entered in the form of a decree which essentially ordered East Haven to undertake an outreach program to encourage and inform more qualified blacks to become aware of opportunities for employment by East Haven and to apply therefor. East Haven had previously agreed in essence to such a program during negotiations

Both NAACP and East Haven now claim to be a prevailing party and seek an award of attorney's fees and costs, in the amounts of $500,650 and approximately $250,000 respectively. By virtue of the judgment and decree, NAACP qualifies as a prevailing party and is eligible for an award. East Haven is not. However, the inquiry does not end there. Before the suit was started, NAACP had in hand its objective of a greater public awareness of the availability of East Haven employment to blacks. The demand for attorney's fees was the sole unresolved issue when suit was brought. Five years of litigation, in which NAACP achieved the formalization of a detailed outreach program to which East Haven claims

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it was essentially agreeable before litigation, resulted in the substantial legal fees sought. East Haven claims that their incurral was not reasonably necessary.

As it has achieved a judgment within the relief sought in the complaint, NAACP is a prevailing party. However, its entitlement to attorney's fees is limited to reimbursement for services as were reasonably necessary to achieve the judgment.

II. *FACTS*

This dispute surfaced in 1988 when the NAACP began an investigation as part of its Suburban Litigation Program. NAACP filed a charge of discrimination with the Equal Employment Opportunity Commission ("EEOC") and obtained in a right to sue notice from the EEOC dated July 26, 1990.[1] After meeting with East Haven officials, NAACP allowed the letter to expire without bringing suit. It continued its investigation throughout 1991 and 1992. It filed a second discrimination claim in April 1992 and obtained a second right to sue letter February 23, 1993.

In March 1992 NAACP and East Haven resumed settlement discussions which continued into 1993. Through correspondence and discussion, the parties appeared to reach agreement except on the payment of attorney's fees. On April 19, 1993, Attorney Michael Albis, East Haven counsel, wrote NAACP counsel, "it would seem that we have little in dispute and should be

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[1] An EEOC right to sue letter allows a plaintiff to sue. It expires after 90 days. *See* 42 U.S.C. § 2000e-5(f)(1).

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able to resolve this matter amicably." NAACP's letter of May 4, 1993, listed four elements for a settlement: 1) aggressive recruiting; 2) a public agreement; 3) a provision allowing the plaintiffs to go to court without a new right to sue letter, should the need for enforcement arise; and 4) attorneys' fees. Attorney Albis informed NAACP Attorney Stephanie Rones that the town agreed to all of the items except attorney's fees which remained unresolved. In addition he wrote that he had forwarded the proposal to town officials for their review. NAACP did not communicate further with East Haven and filed this lawsuit two weeks later.

This case was tried on the discriminatory intent and disparate impact claims. Trial was suspended to allow NAACP to add East Haven Board of Education as a defendant and additional disparate impact claims. Judgment entered in June 1998 essentially ordering items 1-3 of NAACP's May 4, 1993 letter, but with greater specificity.

III. *DISCUSSION*

A. *The Prevailing Party Threshold*

Title VII entitles a prevailing party to a reasonable attorneys' fee, at the district court's discretion. 42 U.S.C. § 2000e-5(k); *Hensley v. Eckerhart*, 461 U.S. 424, 431, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983). This statutory threshold does not present a significant obstacle. *See Texas Teachers Assn. v. Garland Independent School Dist.*, 489 U.S. 782, 790, 109 S.Ct. 1486, 103 L.Ed.2d 866 (1989). "Plaintiffs may be considered 'prevailing parties' for attorney's fees purposes if they succeed on any significant issue. . . . which

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achieves some of the benefit the parties sought in bringing the suit." *Hensley*, 461 U.S. at 433, 103 S.Ct. 1933 (citations and quotations omitted). Plaintiff is not required to prove all the asserted claims. *Id.* at 435, 103 S.Ct. 1933; *Grant v. Martinez*, 973 F.2d 96, 101 (2d Cir.1992). A mixed result has no adverse affect [sic] on fee eligibility so long as all claims relate to a common core of facts or related legal theories. *Hensley*, at 435, 103 S.Ct. 1933.

"[P]laintiff must be able to point to a resolution of the dispute which changes the legal relationship between itself and the defendant." *Garland*, 489 U.S. at 792, 109 S.Ct. 1486. A plaintiff may meet this requirement only in the most technical sense and still qualify, whether by court judgment, settlement or consent decree. *See, e.g., Farrar v. Hobby*, 506 U.S. 103, 111, 113 S.Ct. 566, 121 L.Ed.2d 494 (1992) (plaintiff who sued for $17 million and received nominal damages considered a prevailing party for the purposes of the statute); *Maher v. Gagne*, 448 U.S. 122, 129, 100 S.Ct. 2570, 65 L.Ed.2d 653 (1980) (prevailing party on the basis of settlement). For eligibility, the "touchstone of the prevailing party inquiry must be the material alteration of the legal relationship of the parties." *Garland*, 489 U.S. at 792-793, 109 S.Ct. 1486.

B. *Plaintiff's Motion for Attorneys' Fees*

East Haven challenges NAACP's entitlement to attorneys' fees on the grounds that NAACP was not the prevailing party, that NAACP attained an insufficient degree of success, and that NAACP rejected in settlement the relief finally ordered.

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East Haven initially argues that NAACP is not a prevailing party because it alleged intentional discrimination and disparate impact and the former claim was not proven. *See* Memorandum of Decision date [sic] March 23, 1998 ("Memorandum"), at p. 17. Regarding the latter claim, East Haven asserts that every element of the relief obtained by the plaintiff was either already in place or had been offered by East Haven before the suit was filed and thus NAACP did not thereby alter the legal relationship between the parties.

NAACP's lack of success on its discriminatory intent claim does not preclude its eligibility. Both claims arise from the same core facts and constitute two prongs of a single legal theory. Each addresses racial discrimination in East Haven's hiring practices and, as such, "cannot be viewed as a series of discrete claims." *Hensley*, 461 U.S. at 435, 103 S.Ct. 1933.

The relief dictates whether NAACP prevailed. *See Id.* Judgment resulted in a Decree. East Haven's claim that before suit it met, and continues to meet, its obligations under the Decree, does not detract from the fact that this litigation changed the legal relationship between NAACP and East Haven. *See Farrar*, 506 U.S. at 111, 113 S.Ct. 566; *Ruggiero v. Krzeminski*, 928 F.2d 558, 564 (2d Cir.1991) (finding that plaintiffs' rights were violated, without compensatory damages, changes relationship). For example, NAACP may seek a court order to enforce this decree, which it could not do previously. *See, e.g., Eirhart v. Libbey-Owens-Ford Co.*, 996 F.2d 846, 850 (7th Cir.1993) (civil rights litigation included enforcement of consent decree, for which plaintiff awarded attorneys's fees).

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NAACP has obtained relief of the nature sought and thus qualifies as a prevailing party.

Nonetheless East Haven argues that discretion to award fees under § 2000e-5(k) should not be exercised as plaintiff obtained only minimal success. *See Farrar*, 506 U.S. at 115, 113 S.Ct. 566; *LaRouche v. Kezer*, 20 F.3d 68, 72 (2d Cir.1994) (no fee award for *de* minimis or technical victory). East Haven argues that notwithstanding years of litigation, the addition of new defendants and the expansion of its legal claims, NAACP achieved no greater success than was available to it before suit. This argument does not support denial of fees. While NAACP's achievement in this litigation fell short of its ambitions, its success is not *de minimis*. East Haven's argument more strongly applies to the amount of fees, where the degree of success constitutes the most significant factor. *Hensley*, 461 U.S. at 436, 103 S.Ct. 1933.

Lastly, East Haven contends that NAACP is not eligible for fees because it rejected an offer of settlement. A party's settlement conduct is relevant to the amount of an award. *See e.g., Sheppard v. Riverview Nursing Center, Inc.*, 88 F.3d 1332, 1337 (4th Cir.1996) ("a court may consider a plaintiff's rejection of a settlement offer as one of several factors generally informing its discretionary inquiry . . . "); *E.E.O.C. v. Nutri/System, Inc.*, 685 F.Supp. 568, 577 (E.D.Va.1988) (settlement demands noted in attorneys' fee analysis). Nevertheless, NAACP's posture in settlement does not preclude its eligibility; it is eligible for efforts necessary to bring the case to settlement. *See Maher*, 448 U.S. at 129, 100 S.Ct. 2570; *also see, e.g., Richard v. Pasadena*, 889 F.Supp. 384, 388 (C.D.Cal.1995) (voluntary efforts short of full adjudication merit award of fees).

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C. *Defendant's Motion for Attorneys' Fees*

East Haven moves for attorney's fees on the grounds that it prevailed on the claims of disparate impact and discriminatory intent and that it substantially offered to meet all of NAACP's demands before litigation. East Haven points to NAACP's failure to prove discriminatory intent. Regarding disparate impact, East Haven argues that the judgment subjected it to no more than what it already did or, in settlement, offered to do; thus NAACP did not advance its position and East Haven prevailed.

The statute protects plaintiffs in the pursuit of legitimate claims who, for whatever reason, do not obtain a judgment in their favor. "[Congress] wanted to protect defendants from burdensome litigation having no real or factual basis." *Christiansburg Garment Co. v. E.E.O.C.*, 434 U.S. 412, 417 (978), 98 S.Ct. 694, 54 L.Ed.2d 648. A "plaintiff should not be assessed his opponent's attorney's fees unless a court finds that his claim was frivolous, unreasonable, or groundless, or that the plaintiff continued to litigate after it clearly became so." *Id.* at 422, 98 S.Ct. 694.

East Haven's argument falls short both factually and legally. Although East Haven may consider the end result a positive one, it does not qualify as a prevailing party. As previously discussed, NAACP is a prevailing party as a matter of law. East Haven cannot prevail where NAACP has prevailed. *Id.* at 421, 98 S.Ct. 694 ("a district court may in its discretion award attorney's fees to a *prevailing defendant* . . . ") (emphasis added).

East Haven also suggests that NAACP's behavior in settlement entitles it to attorney's fees. A suit with merit

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at the outset can become frivolous when later events demonstrate a lack of merit. *Id.* at 421, 98 S.Ct. 694; *Greenberg v. Hilton Int'l Co.*, 870 F.2d 926, 940 (2d Cir.1989), *vacated on other grounds*, 875 F.2d 39 (2d Cir.1989). NAACP proceeded with the litigation and ultimately prevailed. The judgment confirms that NAACP's claims were not frivolous, unreasonable, or without foundation.

East Haven has not proven that it is a prevailing party nor that NAACP's claims were frivolous. At most East Haven has shown that NAACP could have obtained the same relief by settlement and without incurring, or causing, the legal fees resulting from the trial. That fact does not entitle East Haven to attorney's fees and its motion is denied.

D. *Amount of Award*

1. *Degree of Success Obtained*

The amount of fee awarded to a prevailing party, or whether any fee will be awarded, presents a different question from eligibility. *Farrar*, 506 U.S. at 114, 113 S.Ct. 566. As the statute provides, the award must be reasonable. 42 U.S.C. § 2000e-5(k); *see also, Hensley*, 461 U.S. at 433, 103 S.Ct. 1933. "[T]he district court has wide discretion in determining the amount of an attorney's fee award; [and] absent an abuse of discretion or an error of law we will not disturb the district court's assessment of the appropriate fee award." *Grant*, 973 F.2d at 99; *see also, Hensley*, 461 U.S. at 437, 103 S.Ct. 1933; *Chambless v. Masters, Mates & Pilots Plan*, 885 F.2d 1053, 1057-58 (2d Cir.1989). Reasonableness is measured in the amount

awarded but also as to the necessity for the work performed.

"[T]he most critical factor in determining the reasonableness of a fee award is the degree of success obtained." *Farrar*, 506 U.S. at 114, 113 S.Ct. 566 (quoting *Hensley*, 461 U.S. at 436, 103 S.Ct. 1933). A plaintiff is not due an award on the basis of nominal or technical success, in spite of eligibility as a prevailing party. *Farrar*, 506 U.S. at 115, 113 S.Ct. 566 ("When a plaintiff recovers only nominal damages . . . the only reasonable fee is usually no fee at all."); *LaRouche*, 20 F.3d at 72 (no award despite interim injunctive relief where party does not succeed on merits at any stage including appeal). "[W]here a plaintiff has obtained excellent results, his attorney should recover a full compensatory fee." *Hensley*, 461 U.S. at 435, 103 S.Ct. 1933. If a plaintiff obtains "limited success, the district court should award only that amount of fees that is reasonable in relation to the results obtained." *Id.*

"Limited success" and "excellent results" are not clearly defined. *Hensley* sets general guidelines without specifying criteria. The district court must address reasonable factors. *See City of Riverside v. Rivera*, 477 U.S. 561, 106 S.Ct. 2686, 91 L.Ed.2d 466 (1986). The inquiry requires broad consideration of the entire litigation and close knowledge of the facts of the case and the final judgment. *Hensley*, 461 U.S. at 437, 103 S.Ct. 1933; *also see Davis v. Southeastern Pennsylvania Trans. Auth.*, 924 F.2d 51, 55 (3d Cir.1991) ("The lower court judges have had an obligation to breathe more specificity into the meaning of these terms.").

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NAACP achieved more than nominal success. The final Decree mandates an aggressive program to recruit minorities to East Haven's employ, a positive result for NAACP. However, factors apparent immediately before the lawsuit began, suggest that NAACP did not obtain "excellent results," for statutory purposes, at least by means of the litigation. East Haven then complied with some of the Decree's provisions. East Haven's pre-suit settlement position entailed substantially all of the relief ultimately obtained. NAACP's pursuit of this case to judgment formalized, by the decree, what was available in East Haven's willingness to modify its hiring practices as articulated in its responses to NAACP's pre-suit demands. All of these facts bear on its degree of success. *See, e.g., Vocca v. Playboy Hotel of Chicago*, 686 F.2d 605 (7th Cir.1982) (behavior of litigant bears on amount of fee award). The legal services on which NAACP bases its motion did not substantially enhance its legal relationship to East Haven over the relationship that was at hand had NAACP pursued East Haven's willingness to modify its hiring practices as stated by Atty. Albis. It cannot be said that the litigation "change[d] the legal relationship between itself and defendant." *Garland*, 489 U.S. at 792, 109 S.Ct. 1486. The judgment, in comparison to what was available in May, 1993, suggests limited success from the lawsuit.

NAACP pursued this lawsuit apparently only after its claim of attorney's fees was not accepted. NAACP made its demands of East Haven, to which the town assented, reserving only the issue of attorney's fees. NAACP did not reasonably pursue this lawsuit when what it sought of the town was agreeable to East Haven,

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except for its claim for fees. Settlement then would have brought about the changes NAACP sought. Congress envisioned that faced with the relief available under the statute certain defendants would respond voluntarily to charges of discrimination. *See* H.Rep. No. 1558, 94th Cong., 2d Sess. 9, U.S.C.C.A.N.1976, p. 2641; *Maher*, 448 U.S. at 129, 100 S.Ct. 2570.

NAACP's failure to settle the dispute, or at least to pursue negotiation further also constitutes a factor to be considered in a fee award. *See, e.g., Vocca*, 686 F.2d at 607 (successful age discrimination plaintiff's rejection of settlement offer only slightly less than amount ultimately agreed upon held to substantiate trial court finding that the litigation was unduly prolonged and denial of attorney's fees); *Sheppard*, 88 F.3d at 1337; *Nutri/System*, 685 F.Supp. at 577 ("[A] party should not be permitted to increase a fee award by making unreasonable settlement demands that unnecessarily prolong the litigation."). Under somewhat similar circumstances in *Vocca*, fees were denied entirely. 686 F.2d at 607-608. It is noteworthy that NAACP was obliged for slightly over $5,000 in fees by May, 1993, approximately 1% of the total expenses for which they seek reimbursement.

NAACP argues that the issue of fees remained outstanding, thus necessitating a [sic] the litigation and trial. This is not merited. The statute authorizes award of a reasonable attorney's fee "[i]n any action or proceeding under this subchapter." 42 U.S.C. § 2000e-5(k). When Atty. Albis stated the town's acquiescence in all but the fee demands, there was no "action or proceeding" pending and there was then no statutory entitlement to a fee. Plaintiff does not have cause to sue to resolve a dispute

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which centers on a claim for fees for which there was no statutory authority until after the suit was brought. Initiation of the suit served only the purpose of qualifying NAACP to be awarded a fee. Fees should not be sought for their own sake. *See Rivera*, 477 U.S. at 580, 106 S.Ct. 2686 (cautions against using statutory fee awards to produce "windfalls to attorneys" (citations omitted)). Had NAACP then settled, it could have sued for the limited purpose of adjudicating its eligibility and entitlement to an award of attorney's fees. *See, e.g., Vocca*, 686 F.2d at 606. Such a course of action would have avoided the substantial legal expense of defending this suit and the dispute as to NAACP's entitlement would have concerned fees of approximately $5,000 as opposed to the present claim of over $500,000.

The purpose of § 2000-5(k) as part of sub-chapter II, Chapter 21, Title 42, is to promote conflict resolution through conciliation rather than through litigation. *U.S. v. City of Hialeah*, 899 F.Supp. 603 (S.D.Fla.1994); *McCarthy v. Cortland County Community Action Program, Inc.*, 487 F.Supp. 333 (S.D.N.Y.1980). Fee recovery is intended to encourage counsel to represent those with meritorious claims of discrimination and to seek statutory relief. *Copeland v. Marshall*, 594 F.2d 244 (D.C.Cir.1978); *Parker v. Califano*, 561 F.2d 320 (D.C.Cir.1977). Congress cannot have intended to impose a claimant's attorney's fees on an alleged discriminator which, without being sued, agrees to modify its conduct as demanded to eliminate the asserted discrimination. Trial has substantially increased counsels' fees, the prospect of which would have created a conflict of interest if counsel were substantially involved in the decision to sue or settle with or

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without reserving the right to seek adjudication of NAACP's eligibility and entitlement to an award of the fees then incurred. *See, e.g., Davis v. Southeastern Pennsylvania Transp. Auth.*, 735 F.Supp. 158, 161 (E.D.Pa.1990) (conflict of interest where attorney did not move for new trial on basis of inadequate damages for fear of losing entitlement to fee award); *Munoz v. Arizona State University*, 80 F.R.D. 670, 671 (D.Ariz.1978) (inherent conflict of interest for class action counsel to negotiate simultaneously class settlement and individual attorney's fee).

NAACP passed up benefits in suing rather than settling. A fee award has value for the plaintiff, not diminished where plaintiff is a publicly-supported organization such as NAACP. *Domingo v. New England Fish Co.*, 727 F.2d 1429, 1447 (9th Cir.1984) (representation by a public interest group compensated equally as private litigants). Nevertheless, NAACP could have avoided a trial, including the risk of not recouping the resulting attorney's fees. It could have fashioned its relief through settlement and have had that relief in 1993 instead of five years later. *See Richard*, 889 F.Supp. at 390 (no benefit to plaintiff's in litigation prolonged after achieving their goals).

NAACP argues that suit was started on the eve of the expiration of its right-to-sue letter, leaving it no choice but to file suit then. However, it had allowed a prior right-to-sue letter expire. It made no effort to extend the second one. There is no showing that a third letter could not have been obtained; the alleged discrimination continued.

NAACP argues that its stance on settlement should not affect its motion as East Haven has not come within

Fed.R.Civ.P. 68, under which plaintiff pays defendant's costs if a rejected offer exceeds the recovery. Rule 68, which East Haven has not invoked, does not affect fee shifting statutes. *See Marek v. Chesny*, 473 U.S. 1, 11, 105 S.Ct. 3012, 87 L.Ed.2d 1 (1985) ("Section 1988 encourages plaintiffs to bring meritorious civil rights suits; Rule 68 simply encourages settlements. There is nothing incompatible in the two objectives.") NAACP's citation of *Cowan v. Prudential Ins. Co. of America*, 728 F.Supp. 87, 92 (D.Conn.1990), *rev'd on other grounds*, 935 F.2d 522 (2d Cir.1991), is misplaced for Judge Winter there dealt with settlement discussed after suit was brought but before trial and declined to bar plaintiff's fee recovery, treating the case under Rule 68. NAACP's motion is determined under the statute, not under Rule 68.

2. *Computation of NAACP's Award*[2]

Where a plaintiff obtains excellent results in litigation, fee awards generally follow the "Lodestar Method", in which the product of hours reasonably expended times a reasonable hourly rate is a baseline award. Other considerations may prompt upward or downward adjustments to the lodestar figure. *See Grant*, 973 F.2d at 101. In cases of limited success the lodestar method is not necessarily followed at all:

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[2] East Haven does not address the reasonableness of NAACP's hour and rate submissions but requests leave to submit additional memoranda to contest the issue. Another round of briefing would risk a "second major litigation", which the statute strives to prevent. *See Hensley*, 461 U.S. at 437, 103 S.Ct. 1933. East Haven has had ample opportunity to respond.

> "If, on the other hand, a plaintiff has achieved only partial or limited success, the [lodestar method] may be an excessive amount. This will be true even where the plaintiff's claims were interrelated, nonfrivolous, and raised in good faith. Congress has not authorized an award of fees whenever it was reasonable for a plaintiff to bring a lawsuit or whenever conscientious counsel tried the case with devotion and skill. [T]he most critical factor is the degree of success obtained."

Hensley, 461 U.S. at 436, 103 S.Ct. 1933; *see also, Farrar*, 506 U.S. at 115, 113 S.Ct. 566 (no fees for prevailing plaintiff). The degree of success also does not create a formula; "proportionality rules" have been rejected. *Rivera*, 477 U.S. at 571, 106 S.Ct. 2686 (rejecting proportionality in all circumstances by a 4-1-4 decision); *Cowan v. Prudential Insurance Co. of America*, 935 F.2d 522, 526 (2d Cir.1991). In cases of limited success, there must be an "assessment of what is a reasonable fee under the circumstances of the case." *Farrar*, 506 U.S. at 115, 113 S.Ct. 566 (internal quotation and citations omitted); *see, e.g., Myree v. Local 41, Int'l Bhd. of Elec. Workers*, 847 F.Supp. 1059 (W.D.N.Y.1994) (fee award reduced by 75% due to limited success).

NAACP seeks $445,215 in fees and $55,435 in costs, almost all attributable to trial. In May 1993, NAACP could have achieved its objectives via settlement, with the possible exception of recovery of fees and costs. At that point, NAACP had only incurred approximately $3,000 in expenses.[3] Thus, the litigation hoped to achieve only a fee

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[3] NAACP also requests compensation for 70 hours expended by Attorney Stephanie Rones, for whom it could not

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award. Civil rights laws serve the public, not attorneys' employment. *Rivera*, 477 U.S. at 580, 106 S.Ct. 2686. Reimbursement for NAACP's legal work up to the point at which it secured its goals is warranted. *See, e.g., Eirhart*, 996 F.2d at 851. This point occurred in May, 1993, when East Haven met NAACP's substantive demands with respect to its hiring practices. The litigation did not advance substantially beyond that to which East Haven then agreed.

Through May, 1993, Attorney David L. Rose spent .75 hours, in a supervisory role. Attorney Joshua N. Rose spent 14 hours, mostly on correspondence and factual investigation. These expenses are recoverable. NAACP claims approximately 70 hours for Attorney Stephanie Rones without documentation. Without billing records or even an affidavit, an award to the extent claimed for Attorney Rones's work is not justified. However of necessity she had to have spent some time doing the work which constituted the foundation on which the Rose firm built when it took over the case. As best the court can assess what that work necessarily entailed, 35 hours is allowed. Attorney Joshua Rose also spent 9.9 hours on the fee application.[4] The cost of this work is also recoverable.

Attorney David Rose requests $330 per hour. He has practiced law for over 40 years. He is a lawyer of great

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locate any records. NAACP never submitted any additional material documenting Attorney Rones's efforts.

[4] Attorney Joshua Rose claims additional time was spent on the fee petition. No further documentation has been submitted. No entitlement to its additional time has been proven.

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experience, integrity and professional stature. The rate claimed is reasonable for a lawyer of his capability. Attorney Joshua Rose requests $195 per hour for work through July, 1994, and $230 per hour since then. Attorney Joshua Rose has practiced law since 1987 with experience in civil rights litigation. A rate is [sic] $195 is reasonable for all his work. Ms. Rones's experience is comparable to that of a junior associate and would justify an hourly rate of $155.

Through May, 1993, NAACP incurred fees in the amount of $8,402.50 as follows: Attorney Joshua Rose, 14 hours at $195 per hour, $2,730; Attorney David Rose, .75 hours at $330 per hour, $247.50; Attorney Stephanie Rones 35 hours at $155 per hour, $5425. In June, 1998, Attorney Joshua Rose spent 9.9 hours at $195 per hour, $1,930.50. NAACP also incurred costs of $33.20 for fax and copies, which are appropriate. The total award to NAACP is $10,366.20.

IV. *CONCLUSION*

Plaintiff's motion for attorney's fees and costs [Doc. # 198] is GRANTED in the amount of $10,366.20. Defendants' motion [Doc. # 195] is DENIED.

SO ORDERED.

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United States District Court,
D. Connecticut.

NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, New Haven Branch of the NAACP

v.

TOWN OF EAST HAVEN, East Haven Board of Education.

No. 3:96CV1050 (PCD).

March 25, 1998.

David N. Rosen, Rosen & Dolan, P.C., New Haven, CT, *David L. Rose, Joshua Rose*, Washington, DC, for Plaintiffs.

Hugh F. Keefe, Lynch, Traub, Keefe & Errante, New Haven, CT, for Defendants.

MEMORANDUM OF DECISION

DORSEY, District Judge.

Plaintiffs (collectively hereafter "NAACP") seek relief from the Town of East Haven, Connecticut and by amendment the East Haven Board of Education (hereinafter collectively the "Town"). The claim is brought under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq. ("Title VII"). Plaintiffs allege discrimination in the hiring of Town employees against African-Americans as a group. They seek an order that the Town enhance its recruiting, advertising, testing and hiring practices to attract a greater number of qualified African-Americans to apply for Town employment, enhancing the likelihood of increased African-American employment by the Town.

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Employment is not sought for any individual. No damages are sought.

Though disparate treatment is asserted, requiring proof of discriminatory motive and intent, that claim has not been proven. In view of the relief sought, the case will be considered under the disparate impact theory which does not require such proof. *See* 42 U.S.C. § 2000e-2(k). The parties were fully heard and briefs filed, the last on November 12, 1997.

Plaintiffs claim that the Town has created a substantial disincentive to blacks to apply for Town employment due to a perception of bias, a lack of welcome to blacks as job applicants, and an unlikelihood that black applicants would be fairly considered. It is not contended that these disincentives are the result of affirmative conduct by the Town, nor specifically part of the Town's employment processes. Rather, plaintiffs contend that the Town's hiring process has failed to include an outreach in the form of recruiting and advertising that would overcome the negative perception and successfully prompt job applications by a broad, representative cross-section of the black community which would increase black hiring.

Defendants object to Exhibits 86 and 87. Exhibit 87 contains a list of contributions to the Town Mayoral campaigns of incumbents from 1991 to 1995. As there is evidence of political affiliation between the Mayor and some Town hirees, limited relevance has been shown. Exhibit 87 will be admitted.

Exhibit 86 is a deposition of Greg Maisel and is proffered to demonstrate the efficacy of radio advertising in the Detroit area. As not relevant to the Greater New

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Haven area, defendants' objection is sustained. Exhibit 86 is not admitted.

I. FACTS

Plaintiffs are associations which act in protection of the rights of minorities, particularly African Americans. The requisite complaint was filed on April 29, 1992. A right to sue letter issued on February 23, 1993. This action ensued.

East Haven is a municipality in the Greater New Haven area, bounded by New Haven, North Haven, Branford, North Branford and the Long Island Sound. The Town has an economic interdependence with New Haven, of which it is essentially a suburb. The Town population is approximately 26,000, of which, in 1990, 231 (.9%) were African-Americans. Most Town residents are employed outside the Town. It is linked to New Haven by city streets and Interstate, I-95. A Transportation District provides public transportation within the Town, to New Haven, and among eight (8) of fifteen (15) towns in the New Haven/Meriden Primary Metropolitan Statistical Area ("PMSA"). The eight include the largest segment of the total PMSA population. The Town is readily accessible from other PMSA and bordering towns by private transportation. The PMSA is the primary source for Town employees.

The Town employs 200 full time, 26 part-time and 83 seasonal persons. On the last roster, 25% were residents of towns other than East Haven, and 75% were Town residents. The Town has no employment residency requirement, nor is there an announced policy of Town

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resident hiring. According to its Equal Employment Opportunity reports from 1983 through 1996, the Town employed no blacks. The first black was hired in February 1997, as Welfare Director.

The Town Board of Education is a State Agency charged with authority over and responsibility for public school education of East Haven children. It employs about 363 full time and 53 part-time workers. In the PMSA, of all certified teachers and educators reported in the 1990 census (a total of 5,474), 8.7% were black. The PMSA school systems reported 389 black teachers and educators, 7.1% of the total. Of 258 East Haven teachers and educators in 1993, none were black. For an uncertain time in the 1970s and 1980s, the Town employed one black special education teacher, and in 1987 or 1988, a black messenger was employed. Three black part-time tutors were hired in 1994. Each opted for other permanent employment at the end of the school year. A part-time coach and a teachers aide, both black, were hired in 1996, but as of July 1996 no blacks were employed by the Board. In 1997 two part-time employees were black. The present Superintendent is a Native American.

The 1990 Greater New Haven population, including Bethany, Branford, Cheshire, Clinton, East Haven, Guilford, Hamden, Meriden, New Haven, North Branford, North Haven, Orange, West Haven, Wallingford, and Woodbridge was 525,366 of whom 64,197 (12.2%) were African-Americans. New Haven's 1990 population was 130,474 of whom 47,157 (36.1%) were African-American. That was 73% of the blacks in this region. Of the 78,685 regular employees of private employer establishments in the PMSA, 10,685 (13.6%) were black and 10.7%

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of the PMSA civilian work force was black. East Haven has two Zip Codes, both of which include small segments of New Haven. The work force of private employers in those two areas which file EEO-1 forms is 17.7% black.

No deliberate discriminatory conduct attributable to the Town was shown to have prevented hiring any individual plaintiff. Three African-Americans, members of plaintiffs, applied for employment by defendants. Two of them, Mr. Brathwaite and Mr. Brayboy, failed to attend scheduled depositions. Their applications were not in evidence. Two plaintiffs, Ms. Brown and Ms. Cain, did not pursue Town employment. Another member of plaintiffs, Mr. Ricardo, was certified after examination. However, he was not recommended by a prior employer and was decertified when charged with sale of cocaine. He remained on the eligible list until he was later murdered.

Mr. Highsmith, a Town resident, requested a job of then Mayor Luzzi. He was a temporary replacement custodian for seven months until the regular custodian returned. He took a maintenance worker examination but did not pass. He faulted the examination for emphasizing plumbing. He correctly answered 15 of the 30 plumbing questions and 79 of the total of 160 questions, resulting in an overall score of 49. For a time he was called for temporary custodian positions, but was never reachable or available. He passed the March 1994 custodian examination, with which he took no exception, but ranked 17th on the eligibility list.

Edward Jefferson applied for a maintenance position. The test was delayed and he did not take it. He did not reapply for employment with defendants, but remained

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in a position he took prior to the test. He did not communicate with defendants' agents in person. His application did not disclose his race.

Earl Geyer applied to be a part time fire inspector. He was a full time firefighter/EMT in the New Haven Fire Marshall's office. He had done inspections but never alone. He was not available for emergencies which conflicted with his 42 hour regular work week in New Haven. He was interviewed for a New Haven Fire Inspector's job, but not hired. He was interviewed by the Town Fire Chief who recommended that the job go to Peter Mullen, a retired former Fire Marshall/Fire Chief of Branford. Mr. Mullen had done inspections alone. Before the job was filled, the Fire Chief tried to recruit a specific black New Haven firefighter, but the man did not submit an application.

In the Black Community, according to past and present NAACP Presidents, blacks are perceived as not welcome as Town residents and/or employees, largely based on a lack of black Town residents, the dearth of black Town employees and personal experiences perceived as reflecting discriminatory animus.

The Town's civil service system generally prevents arbitrary hiring. However, some temporary, seasonal and part-time hires are not under civil service. These are limited in number and duration. They can lead to some advantages in applying for civil service appointments. In some cases, candidates may benefit from preferences under collective bargaining agreements or where positions are filled on a promotional basis. Such hirings were not shown to have shut out a black applicant in any

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specific instance. No records as to black applicants for such positions have been shown. Vacancies in promotional positions are, by collective bargaining contracts, subject to preferential claims by Town employees, leaving outsiders discouraged by a lesser chance of success. A number of Mayoral appointments by the incumbent appeared to have been filled based on professional screening, often with non-residents. There was no evidence of exclusion of any black applicant for these jobs. The evidence suggests that competitive examinations were used for the 53 new hires between 1992 and 1997.

Other than for police and fire, six civil service examinations were administered between 1995 and 1997. Five were for municipal employment and one for the Board of Education. The results follow:

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Position	Applicants	Black Applicants	Examinees	Black Examinees	Overall Passed	Blacks Passed	Black Ranking
Truck Driver	158	12	96	6	85	2	40/50 48/50
Maint. Worker	122	3	64	0	18	0	N/A
Admin. Assist. (6/95)	73	3	N/A	2	54	1	36
Secretary Bd. of Ed.	49	2	36	1	13	0	N/A
Admin. Assist. (2/96)	62	2	32	1	25	1	24
Mechanic	19	0	N/A	N/A	N/A	N/A	N/A

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Four were promotional positions. All were filled by persons in the top three on the Civil Service certified list. From 1992 to 1997, of 58 appointments, at most 5 were openly competitive, non-promotional.

Laborer positions in the Public Services Department were not subject to civil service procedures. These positions were filled at Mayoral direction by the Director of Public Works, without advertising, frequently from applicants who appeared at town hall. Of fourteen hired between 1992 and 1997, thirteen were East Haven residents and seven were related to town officials or were politically associated with the administration. Prior to 1992, 79.9% of police and 81% of fire appointees were Town residents. Town residents frequently sought employment through elected/appointed officials. Positions requiring specialized knowledge were not subject to testing.

The Town advertises openings in general circulation newspapers in Greater New Haven. Most recently, $1500 was budgeted for Town advertising and recruiting and $3,000 for the Board of Education. The Town advertised in minority newspapers, including the 1995 police and fire examinations. It eschewed radio advertising which it found not to be cost effective as it would have doubled the advertising cost. Print advertising complies with civil service regulations. The Town has not directly encouraged applicants through minority civic/social organizations. It has posted openings throughout town offices, with various civic (including minority) organizations, and in several commercial bulletin boards in the New Haven/East Haven border area. The Town's posting and advertisements advise of equal opportunity employment

and occasionally encouraged minority applications, but not always in language that would encourage black applicants. There is no uniform Town advertising policy.

Boards and Commissions, appointed by the Mayor, are involved in the final selection of civil service employees, usually from among the top three on an eligibility list. No particular civil service list was shown to have involved individual or group discrimination.

Mayoral appointments are usually professional in nature, are limited in number, and are usually advertised.

Teacher vacancies are filled from accumulated applications. One newspaper advertisement per year, placed locally and in D.C., Virginia and California minority publications, announces that applications will be accepted. A similar announcement is made at Southern Connecticut State University and at a local Teachers' Agency. Additional paid advertising is done when there is an inadequate number of applications to fill upcoming vacancies.

Although one effort was made to encourage black aides to stay on as teachers (it did not succeed), no significant outreach has encouraged applications from minorities, such as through minority educators, educator's conferences, minority civic organizations and postings likely to come to the attention of potential minority applicants. There are media which effectively reach substantial, identified minority audiences. The Town has not explored public service announcement availability, such as are sometimes provided by radio.

Teacher appointments are based on reviews of applications by a professional screening committee pursuant

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to Board of Education promulgated written standards. The committee interviews selected applicants and makes a recommendation to the principal. He or she makes three recommendations to the Superintendent who interviews the finalists and makes a recommendation to the Board. Of teachers hired in 1996, 13 (42%) were Town residents when hired, 18 were not. Between 1991 and 1996, of 96 teachers hired, 71 (74%) were not Town residents. None were black. No records as to black applicants were shown. Of 99 non-professional school employees as of 1996, 91 (91.6%) were Town residents, while 98% of the part-time cafeteria workers resided in the Town. No records of applicants were shown. Of 3 black teachers' aides recruited while students at Southern Connecticut State University, none applied in East Haven after graduation. The Board does no minority outreach advertising for non-professional jobs. A black messenger was provided a rehabilitation program but after a short-lived employment, he voluntarily resigned. Three part-time black employees terminated their employment voluntarily.

In a 1992 police examination,[1] 8% of the examinees for East Haven were black. The highest ranked black on the East Haven list was # 55. He was not reached for appointment within the two year life of the list. In 1995, when the Town disseminated information concerning the process, the examination for Town police officers

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[1] The police examination (including recruitment) was jointly administered for East Haven and Hamden, with applicants designating the town(s) to which they wished the result to be forwarded.

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attracted 18 black candidates, 3.6% of the total of 258.[2] 12 (2.5% of the total) were qualified, and 5 took the examination. One black (20% of the black examinees) passed, while 158 non-blacks (62%) passed. The successful black examinee did not show for the agility test and thus was not eligible for appointment.[3] The agency administering the test conducted a 1½ hour preview for candidates to familiarize themselves with the test procedure and sample questions. Each applicant was provided with advice as to training for the agility test, a guidebook for the examination, and a reading list. Recruiting for the examination was not done by the independent administering agency, as had been the case in 1992.

The 1992 and 1995 police tests were developed from the same source using the same criteria to predict success at the police academy. The test has been and is being used by other Connecticut communities. It was allegedly validated by showing that the police academy grades of 39 candidates statistically correlated to their examination scores. Thus the test was claimed to predict accurately candidates' performances at the police academy. The test

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[2] In 1992 when the South Central Justice Administration did the dissemination, as part of the administration of the examination for several towns, 8% of the applicants who registered their examination results with East Haven were black.

[3] This fact illustrates the difficulty in drawing inferences from a mere statistic. The failure to show for the agility test is argued by the Town to reflect that the applicant was not genuinely interested in the job. Yet being ranked as low as he was, the prospect of actual employment may have appeared minimal and could have discouraged the applicant from pursuing the process further.

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scores of 129 college volunteers, with an average of 18 credit hours, compared favorably with their admission test and their college grade point averages. The students had the same high school diploma or GED and were of comparable age and race mix as the applicants. Defendants support the test's validity by pointing to training success as a reflection of necessary job skills.

For a 1995 fire fighter examination, 2.9% of the examinees were black. Of 442 qualified applicants, 13 were black (3%). Of the 326 who took the test, 8 (2.6%) were black. No black passed.

There was no evidence of overt discrimination against blacks as a group, nor against a particular black, in the selection of an employee for any position. The Town has an equal employment opportunity plan in relation to which there was no conduct significantly bearing on the issues here presented.[4]

The PMSA population which is qualified and available for municipal employment is between 15.8% and 20.5% black. The lack of records as to the race of applicants precludes a finding that blacks apply in proportion to their makeup of the relevant job market. Government employment of blacks, state and local, is 16% higher than black private employment, which in the East Haven Zip Codes was 17.7% overall and 47% for service workers. The figures must be tempered by the fact that part of New Haven, with a high black population, is included in that geographic area. Projection of a median expectable

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[4] The EEO Officer testified that he had not read the plan to know its details.

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black employment level by the Town (at 47%), cannot be justified, but 16-17% could be.

The PMSA private work force overall is 13.6% black, which if applied to East Haven projects a statistical likelihood of 37-38 Town black employees. The disparity between that figure and actual Town black employment is 6.5 standard deviations. Plaintiff's expert expected 15.8% black employment by the Town. Under his most conservative projection of 10.7%, the disparity is 5.1 standard deviations. A somewhat lower disparity is suggested by plaintiff's evidence for professionals and educators, 4.1 standard deviations. Such analyses suggest that the actual level of black employment by the Town is not random. Inferentially, it is the result of a non-random factor unique to the group, the race of its members. The statistics were not disputed by the Town, which argues any adverse inference on the basis that the absence of discriminatory animus in any employment decision weighs against a finding that deviation from the expected norm resulted from discrimination.

Plaintiff offered evidence of several hirings suggestive of favoritism for Town residents, nepotism, lack of merit testing, promotional favoritism for lower ranks Town employees, advancement of part-time employees into full time jobs and political favoritism as evidence of non-merit employment. Temporary and part-time jobs are not advertised. As none of these hirings were shown to have adversely affected a black applicant, they cannot have been a factor in the exclusion of a black from Town employment.

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Plaintiffs' counsel advised the Town of its investigation of the Town's hiring, focusing on the dearth of black employment. The Town noted its minority recruiting practices and its intention to pursue minority applicants. Prior to suit, Plaintiffs suggested a consent decree which would require minority radio station advertising, public acknowledgment of the Town's outreach program, acquiescence in prompt court enforcement of the decree, and expense reimbursement including attorney fees. Ex. W. The Town responded that the only area of difficulty in reaching such an agreement would be the question of fees. It asserted that the Town already pursued an active outreach for minority job applicants and would not have difficulty agreeing to do so. Without further pursuit of settlement, this lawsuit was filed.

II. CONCLUSIONS OF LAW

As a state governmental unit employing more than 15 persons, East Haven is subject to Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e(a) and (b). Plaintiffs timely filed a complaint and suit after receipt of a right to sue letter. 42 U.S.C. § 2000e-5(f). Plaintiffs' standing has been upheld. *NAACP v. Town of East Haven*, 892 F.Supp. 46, 49-50 (D.Conn.1995), vacated on other grounds, 70 F.3d 219 (1995).

Plaintiffs claim discriminatory impact on blacks from Town hiring practices. They assert that by its hiring practices the Town has caused the number of black employees to be so disproportionate, compared to the black population in the relevant employment market, as to constitute

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discriminatory impact. Such a claim is within the amendments in the Civil Rights Act of 1991, § 3(3). Pub. 102-166, 105 Stat. 1071 (specifically confirming propriety of disparate impact suits); *see Griggs v. Duke Power Co.*, 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971). The claim here is not for specific jobs lost due to discriminatory animus, but for prospective relief. They seek positive outreach, recruiting and encouragement efforts which are allegedly necessary to convince blacks that employment by the Town is truly open to them. In turn, qualified blacks will, hopefully, successfully seek Town employment in open competition. Plaintiffs point to the paucity of blacks in Town employment and among those who succeed in Town job applications.

Plaintiffs rely on the statistical disparity as "proof of a pattern or practice of discrimination." *Hazelwood School District v. United States*, 433 U.S. 299, 307-08, 97 S.Ct. 2736, 53 L.Ed.2d 768 (1977) (citing *Int'l Bhd. Of Teamsters v. United States*, 431 U.S. 324, 339, 97 S.Ct. 1843, 52 L.Ed.2d 396 (1977)). A seemingly neutral practice which results, or tends to result, in a discriminatory hiring pattern may suffice to sustain plaintiffs' burden of proof of a prima facie case of disparate impact. *Dothard v. Rawlinson*, 433 U.S. 321, 329, 97 S.Ct. 2720, 53 L.Ed.2d 786 (1977). "[A] facially neutral employment practice" may violate Title VII in a disparate impact case without evidence of the employers' subjective intent to discriminate. *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 645-46, 109 S.Ct. 2115, 104 L.Ed.2d 733 (1989). In using a statistical basis for the claim of disparate impact, " 'the proper comparison [is] between the racial composition of [the at-issue jobs] and the racial composition of the qualified. . . . population in

the relevant labor market.' " *Id.* 490 U.S. at 650 (quoting *Hazelwood*, 433 U.S. at 308) (internal quotes, brackets and ellipses in original).

In *Wards Cove*, the plaintiffs compared cannery and non-cannery job holders, members of the former alleging disparate representation of minorities in non-cannery employment. The comparison was faulted for lack of evidence that cannery workers were qualified for non-cannery jobs. One could not infer that the statistical discrepancy in non-cannery employment resulted from discrimination. Absent proof of qualification of cannery workers to perform non-cannery jobs, the discrepancy could have resulted from the cannery workers not being qualified to perform the non-cannery jobs. In such circumstances, discrimination could not reasonably be inferred to explain the discrepancy.

With evidence of qualification of the group claiming discrimination the remaining distinction between the two classes of employees is race, measured by the statistical discrepancy. In cases of sufficient statistical disparity, it may legitimately be found/inferred that the employment practices which resulted in the discrepancy were discriminatory, i.e. that race was a factor. *See, Sobel v. Yeshiva University*, 839 F.2d 18, 34 (2d Cir.1988). Plaintiffs may establish a prima facie case "Where 'figures for the general population might . . . accurately reflect the pool of qualified job applicants.' " *Wards Cove*, 490 U.S. at 651 n. 6 (citations omitted). This seemingly limited basis to prove disparate impact statistically is subject to a different analysis "if it were found that the dearth of qualified nonwhite applicants were due to practices on [the employer's] part which – expressly or implicitly –

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deterred minority groups members from applying for noncannery positions." *Wards Cove*, 490 U.S. at 651 n. 7 (citing *Teamsters*, 431 U.S. at 365). Thus "[a]s long as there are no barriers or practices deterring qualified nonwhites from applying for noncannery positions. . . . if the percentage of selected applicants who are nonwhite is not significantly less than the percentage of qualified applicants who are nonwhite, the employer's selection mechanism probably does not operate with a disparate impact on minorities." *Wards Cove*, 490 U.S. at 653. Non-discriminatory factors in the job market may lead to racial imbalance in a work force. *See, Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 108 S.Ct. 2777, 101 L.Ed.2d 827 (1988); *EEOC v. Chicago Miniature Lamp Works*, 947 F.2d 292, 297 (7th Cir.1991).

Excepting the 1995 tests for police and firefighters, and some alleged generalized practices such as nepotism, favoritism for Town residents, and political allegiances, plaintiffs focus on the disparate number of black town employees compared to black employment and presence in the community. Qualification is sidestepped in this approach. Plaintiffs argue that taking Town employment as a whole, the discrepancy is so large that a lack of precisely the same qualifications for Town employment in members of the relevant labor markets is persuasive evidence that discrimination is a factor.

A substantial number, if not most, "public-sector jobs differ from private-sector jobs only in the identity of the employer." *United States v. Town of Cicero, Illinois*, 786 F.2d 331, 335 (7th Cir.1986) (Posner dissenting/concurring). The Town employs secretaries, clerks, custodians, maintenance workers including numerous trades, drivers,

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mechanics, personnel administrators, data processing personnel, bookkeepers, accountants, personnel supervisors in several fields, laborers, food workers, social workers, medical personnel, etc. Employment in the private sector is substantially comparable although there are some jobs unique to towns and to most private employers.

There has been no direct evidence of purposeful discrimination by the Town in any hiring decision. At most the evidence has shown that Town residents and people involved in the political process have had some entree to the hiring process. Such has not been shown to have excluded blacks from consideration for a particular job, nor to have resulted in jobs being awarded over a black with superior qualifications. Even in the police and firefighter examinations of 1992 and 1995, the claim rests on the statistical results and not on the basis that the tests were culturally unfair to black examinees. Thus, the question presented is whether the extremely small, close to non-existent, Town black employment, under the circumstances, over the years and even after this action was brought, can be the basis for an inference that discrimination has been a factor in the low level of black employment.

However, "a Title VII plaintiff does not make out a case of disparate impact simply by showing that, 'at the bottom line,' there is racial imbalance in the work force. As a general matter, a plaintiff must demonstrate that it is the application of a specific or particular employment practice that has created the disparate impact under attack." *Wards Cove*, 490 U.S. at 657; *Watson*, 487 U.S. at

994. "[A] prima facie violation of the Act may be established by statistical evidence showing that an employment practice has the effect of denying members of one race equal access to employment opportunities." *New York City Transit Auth. v. Beazer*, 440 U.S. 568, 584, 99 S.Ct. 1355, 59 L.Ed.2d 587 (1979). Plaintiffs rely on the Town's near zero black hiring and the practice of hiring without a thorough and effective outreach program which would overcome the black community's perception that the Town is not receptive to black applicants.

Analyzing a disparate impact claim involves three steps: (1) a facially neutral employment practice with a disproportionate impact on an identifiable race, gender, nationality; (2) an employment practice related to the job(s) in question or which serves an important business purpose; (3) if the employer meets (2) plaintiff may show that pretext in the claim under (2).

Plaintiffs do not point to a specific employment practice (applied generally or individually) which is not facially neutral. Their real claim is that there are not enough qualified blacks who get their foot into the application process to permit actual Town black employment to approach a level proportionate to the number of blacks comparably employed in the private sector.

III. DISCUSSION

The Town's hiring process has been shown to be facially neutral. The testing has not been shown to incorporate discriminatory practices or procedures. No favoritism deprived a black of an otherwise merited job. No black applicant was denied a teaching placement on the

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basis of race. Although the Town's hiring practices might be subject to question on other grounds, it has been facially neutral. However, it has also resulted in a vast discrepancy across the spectrum of Town employment. The Town's having hired so minuscule a number of blacks, and for substantial periods having had no black employees, reflect hiring practices or procedures which have had a real, substantial and negative impact on blacks. The discrepancy is so far beyond the statistical deviations necessary to draw an inference of race having been a factor, that a prima facie case is found to have been proven.

The Town's explanations for not having hired individuals reflect reasons attributable to the specific black applicants, such as valid disqualification, no-shows for tests and parts of the application process, failures to pass tests (sometimes due to the applicant's personal failures), and low rankings for blacks who passed examinations. Nonetheless, statistical deviations of black employment by the Town from black employment in the private sector in East Haven, in the areas immediately adjacent to and including part of East Haven, and in Greater New Haven, are so large as to overcome the innocuous explanations for the concededly gross statistical discrepancy of black hiring by the Town. Though teacher hiring was not shown to have discriminated against a particular candidate, the result was the same – no black hires. The Town's evidence showed that despite some Town outreach, and awareness of open positions on the part of black teachers, blacks have shunned the Town as a potential employer.

There is a perceived animus against blacks which has discouraged blacks from pursuing Town employment

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opportunities. Plaintiffs did not substantiate this perception by evidence of specific discrimination against an individual job applicant. This might suggest that a remedy to rectify the discrepancy in black employment is inappropriate, since it results from the failure, if not refusal, of qualified blacks to seek Town employment. That, however, is precisely plaintiffs' point. They have demonstrated a perception in the black community that the Town is closed to black employment, unwelcomingly hostile, and resistant.

The Town has refuted discriminatory treatment of each black who claimed personal animus, and presented evidence of the absence of racial animus in all hiring since 1991. It has not shown that the black community's perception of the Town is not true, nor that it is unfounded. The Town's explanation for its inability to hire blacks (i.e., that there has been a lack of qualified black applicants who successfully pass neutral screening) focuses on what occurs in the hiring process. It does not deal with the necessity to overcome the black community's negative perception with an effort calculated to produce what the Town asserts it seeks: A reasonable number of qualified black applicants such that more blacks will pass the application procedures and be ranked high enough to be hired. The Town's response relies on its use of civil service procedures which are bereft of discriminatory animus. It claims to have refuted any suggestion of consideration of race as to each individual whose effort to obtain town employment was the subject of evidence. Further, it claims to have shown that no precedence is given to Town residents and that while political association with the Mayor's party might have

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provided an entree to the hiring process, it has not advantaged any applicant over any black applicant. It asserts that it has refuted any implication that consideration of race has resulted in the absence of hiring of blacks, and claims to have shown that the lack of qualified black applicants is the cause of the dearth of black hiring.

As the Town notes, the number and quality of black applicants for town employment is low. Therein lies a simple answer to plaintiffs' complaint. The Town does not actively avoid, restrict or limit fair consideration of blacks. The question is whether a remedy for the dearth of black employment by the Town is legally warranted. According to the Town, the racial disparity of employment stems from the paucity of qualified black applicants and plaintiffs must prove an affirmative relation between the Town's conduct and the evident adverse impact. Yet the paucity of qualified black applicants may prove plaintiffs' point, since the blacks who have applied do not appear to have been a fair cross section of the black community. This assumes, of course, that a fair cross section of the black community would be sufficiently qualified to produce a proportionate number of black hirees. In other words, it assumes that the black community includes a proportional number of qualified persons.

Although such parity has not been established on the record, and is not assumed, test discrepancies between blacks and non-blacks are so far beyond predictable statistical deviations that one may legitimately infer that race was a factor. If a truly representative sample of blacks applied for Town jobs, their test scores would be comparable to non-blacks. In turn they would be ranked

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and qualified proportionally with non-blacks for hiring. The question is whether, to overcome black reluctance to apply for Town jobs the Town can be ordered to undertake an outreach program.

IV. CONCLUSION

Plaintiffs have established a prima facie case. The number of black Town employees has been drastically deviant, by 3.8 to 7 standard deviations, from statistics which would appropriately measure a reasonably expectable proportion of black Town employees. These would include the census data on blacks in Greater New Haven, the percentage of black employees in the PMSA and the relevant job market, the proportion of blacks in private employment in the Town and the adjacent segment of New Haven, the percentage of black teachers and certified education staff in the PMSA. In an area with a sizeable black population, the failure to hire a black employee cannot be explained as a normal variance, but rather, supports an inference of discrimination. *NAACP v. Town of East Haven*, 70 F.3d 219, 225 (2d Cir.1995) (citing *Teamsters*, 431 U.S. at 335 n. 15); *See United States v. Ironworkers Local 86*, 443 F.2d 544, 551 (9th Cir.), cert. denied, 404 U.S. 984, 92 S.Ct. 447, 30 L.Ed.2d 367 (1971); *United States v. United Bhd. of Carpenters and Joiners*, 457 F.2d 210, 214 (7th Cir.) cert. denied 409 U.S. 851, 93 S.Ct. 63, 34 L.Ed.2d 94 (1972).

The Town has offered evidence of non-discrimination in all specific hiring. Police and fire examinations, of which there was evidence, have not necessarily been so validated. Questions about their formulation were not

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suggestive of negative impact on blacks alone, or even substantially. Though fire fighting experience would advantage a fire fighter examinee, testing in 1995, the advance preparation offered could have added to any examinee's ability to test successfully. Such experience was not calculated to disadvantage blacks. Defendants' evidence has pointed to proper filling of Town jobs, asserting the concept of justified business necessity and relation to the job. However, that tack does not deal with the question of the minority community's perception that the Town is not open to hiring blacks and the consequent paucity of qualified black applicants. Causation is not necessarily determined by discrimination on a particular minority applicant. *EEOC v. Steamship Clerks Union, Local 1066*, 48 F.3d 594, 605-06 (1st Cir.), cert. denied, 516 U.S. 814, 116 S.Ct. 65, 133 L.Ed.2d 27 (1995).

Plaintiff has proven that the minimal hiring of blacks results from factors which would explain black reluctance to seek Town employment. These include the low percentage of black residents in the Town, nearly non-existent Town black employment, lack of black success in seeking Town employment, and the substantial number of hirees who were Town residents and/or had an affiliation with Town officials or political activists. The focus of the firefighter test on practical skills, resulting in appointment of 8 out of 10 hires from the ranks of Town volunteer fire fighters, who were and normally would be Town residents, suggests disfavor to outsiders. These factors, coupled with the undisputed dearth of qualified black job applicants, tend to confirm plaintiffs' claim of a black

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perception of being unwelcome in the Town. It is psychologically foreboding for a black to seek jobs in dominantly, if not exclusively, white employment ranks.

Plaintiffs have not proven concerted, active discrimination against black job applicants. What plaintiffs have proven is that blacks are not being hired because they are discouraged by the hiring process. Race is a factor in hiring if factors which bring race to the fore significantly discourage black applications. For a black who does not enter into the hiring process because that process is fearsome or discomforting to him on account of his race, the factors which create that fear or discomfort are as much preclusive of his getting an equal opportunity to be considered for the job as would an outright, declared refusal to hire him based on his race. A record of zero black hiring makes a finding of discrimination irresistible, "notwithstanding the lack of a specific unsuccessful minority applicant." *Steamship Clerks*, 48 F.3d at 605.

To dispel the perception, and to give credibility to the Town's asserted welcome to black job applicants, a remedy which overcomes, or tends to neutralize, race as a lurking element is warranted.[5] Even absent affirmative

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[5] Defendants' position with respect to this matter, while not conceding any wrongdoing, is not inconsistent with this conclusion. The Town's Mayor, Mr. Luzzi, testified in apparent good faith that he was disturbed by the claimed perception in the black community that blacks were unwelcome as employees of the Town. He attributed the perception "to lack of information about the town." Defs. Post-trial Memorandum at 33. The remedy ordered would, largely, go a long way to rectify the lack of information about the Town's openness to applications for employment from the black community, and

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conduct of a discriminatory nature, recruiting (or non-recruiting) which has a discriminatory effect is not an improper basis for relief. *Chicago Miniature Lamp Works*, 947 F.2d. at 298-99.

The limited evidence of apparent individual indifference is not deemed probative of a general black disinterest. It certainly may be a factor, but what has been shown is that the perception of the Town in the black community is a real factor. The relief sought does not request a quota, nor that specific jobs go to blacks, but rather it seeks an outreach program which would, hopefully, overcome the inhibitions which have discouraged qualified blacks from seeking Town employment in numbers representative of the makeup of the black community. Such relief is properly based on conduct which, though not proven to have been overtly or intentionally discriminatory, is facially neutral but has a disparate impact on a particular group. *Teamsters*, 431 U.S. at 365 n. 15. This is in keeping with the prophylactic objective of Title VII, which is to "achieve equal employment opportunity and to remove the barriers that have operated to favor white male employees over other employees," by fashioning the most complete relief to achieve that result. *Id.* at 364 (citing *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 417-18, 95 S.Ct. 2362, 45 L.Ed.2d 280 (1975); *Griggs*, 401 U.S. at 429-30).

An employer need not hang out a "whites only" sign to discourage black applicants. The message may be

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hopefully dispel the negative perception, which Mayor Luzzi asserted is wrong and wished to correct.

heard in the form of treatment of applicants, publication of openings, recruitment techniques, and "even by the racial or ethnic composition of that part of [the] work force" from which minorities have been excluded. *Teamsters*, 431 U.S. at 365. "When a person's desire for a job is not translated into a formal application solely because of his unwillingness to engage in a futile gesture he is as much a victim of discrimination as is he who goes through the motions of submitting an application." *Id.* at 365-66. Granting such relief has the salutary effect of not permitting discrimination to perpetuate itself. *Newark Branch, NAACP v. Town of Harrison, New Jersey*, 940 F.2d 792, 807 (3d. Cir.1991) (approving relief in the form of advertising and recruitment measures to redress disparity) (citing *Sheet Metal Workers v. EEOC*, 478 U.S. 421, 476, 106 S.Ct. 3019, 92 L.Ed.2d 344 (1986)).

This is not a case of merely looking at the bottom line although the complete lack of hiring of blacks by the Town is certainly a significant factor in the analysis. Rather, the bottom line is enhanced by the evidence of inhibition in the black community which is found to have been a factor in the paucity of black applicants. Defendants have pointed to the paucity, but have gone no further. There is no evidence to support a race neutral explanation for the paucity. There is no evidence of blacks being averse to government employment. There is evidence that in the circumstances of its hiring processes, the Town has inadequately addressed its perception in the black community. It is appropriate to require the Town to elevate its outreach to the black community by advertising and recruiting in a manner and to a degree that hopefully will elevate the number of qualified blacks

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seeking Town employment substantially, such that applying blacks, competing equally with all applicants, can succeed in the hiring process. This will provide the black community with an opportunity to achieve a greater level of black Town employment by encouraging applications from representative members of the black community capable of competing successfully for Town jobs. It guarantees no jobs. It will level the playing field in the mind of the black community. It should encourage blacks to compete for Town jobs by convincing them of equal treatment in the Town's job application processing. This is totally in keeping with the Town's stated goal of equal employment opportunity. It is also consistent with the concept of outreach which the Town claims to espouse. However, by the remedy ordered herein, the Town will be required to make a more concerted outreach effort, which it has expressed a willingness to negotiate. This is not to fault the Town for discouraging black applications, but for failing to encourage such applications to overcome the negative perception of the Town in the black community.

V. REMEDY

Plaintiffs have offered a Proposed Decree. The Town is afforded two weeks from the date hereof to address plaintiffs' specific proposals. The Court will thereupon formulate a specific order consistent with the forgoing discussion.

SO ORDERED.

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UNITED STATES CODE ANNOTATED
TITLE 42. THE PUBLIC HEALTH AND WELFARE
CHAPTER 21 - CIVIL RIGHTS
SUBCHAPTER VI -
EQUAL EMPLOYMENT OPPORTUNITIES

42 U.S.C.A. § 2000e-5. Enforcement provisions

(a) Power of Commission to prevent unlawful employment practices

The Commission is empowered, as hereinafter provided, to prevent any person from engaging in any unlawful employment practice as set forth in section 2000e-2 or 2000e-3 of this title.

(b) Charges by persons aggrieved or member of Commission of unlawful employment practices by employers, etc.; filing; allegations; notice to respondent; contents of notice; investigation by Commission; contents of charges; prohibition on disclosure of charges; determination of reasonable cause; conference, conciliation, and persuasion for elimination of unlawful practices; prohibition on disclosure of informal endeavors to end unlawful practices; use of evidence in subsequent proceedings; penalties for disclosure of information; time for determination of reasonable cause

Whenever a charge is filed by or on behalf of a person claiming to be aggrieved, or by a member of the Commission, alleging that an employer, employment agency, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, has engaged in an unlawful employment practice, the Commission shall serve a notice of the charge (including the

date, place and circumstances of the alleged unlawful employment practice) on such employer, employment agency, labor organization, or joint labor-management committee (hereinafter referred to as the "respondent") within ten days, and shall make an investigation thereof. Charges shall be in writing under oath or affirmation and shall contain such information and be in such form as the Commission requires. Charges shall not be made public by the Commission. If the Commission determines after such investigation that there is not reasonable cause to believe that the charge is true, it shall dismiss the charge and promptly notify the person claiming to be aggrieved and the respondent of its action. In determining whether reasonable cause exists, the Commission shall accord substantial weight to final findings and orders made by State or local authorities in proceedings commenced under State or local law pursuant to the requirements of subsections (c) and (d) of this section. If the Commission determines after such investigation that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion. Nothing said or done during and as a part of such informal endeavors may be made public by the Commission, its officers or employees, or used as evidence in a subsequent proceeding without the written consent of the persons concerned. Any person who makes public information in violation of this subsection shall be fined not more than $1,000 or imprisoned for not more than one year, or both. The Commission shall make its determination on reasonable cause as promptly as possible and, so far as practicable,

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not later than one hundred and twenty days from the filing of the charge or, where applicable under subsection (c) or (d) of this section, from the date upon which the Commission is authorized to take action with respect to the charge.

(c) State or local enforcement proceedings; notification of State or local authority; time for filing charges with Commission; commencement of proceedings

In the case of an alleged unlawful employment practice occurring in a State, or political subdivision of a State, which has a State or local law prohibiting the unlawful employment practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, no charge may be filed under subsection (a)[1] of this section by the person aggrieved before the expiration of sixty days after proceedings have been commenced under the State or local law, unless such proceedings have been earlier terminated, provided that such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective date of such State or local law. If any requirement for the commencement of such proceedings is imposed by a State or local authority other than a requirement of the filing of a written and signed statement of the facts upon which the proceeding is based, the proceeding shall be deemed to have been commenced for the purposes of this subsection at the

[1] So in original. Probably should be subsection "(b)".

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time such statement is sent by registered mail to the appropriate State or local authority.

(d) State or local enforcement proceedings; notification of State or local authority; time for action on charges by Commission

In the case of any charge filed by a member of the Commission alleging an unlawful employment practice occurring in a State or political subdivision of a State which has a State or local law prohibiting the practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, the Commission shall, before taking any action with respect to such charge, notify the appropriate State or local officials and, upon request, afford them a reasonable time, but not less than sixty days (provided that such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective day of such State or local law), unless a shorter period is requested, to act under such State or local law to remedy the practice alleged.

(e) Time for filing charges; time for service of notice of charge on respondent; filing of charge by Commission with State or local agency; seniority system

(1) A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred and notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) shall be served upon the person against whom such charge is made within ten days thereafter, except that in a case of an

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unlawful employment practice with respect to which the person aggrieved has initially instituted proceedings with a State or local agency with authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, such charge shall be filed by or on behalf of the person aggrieved within three hundred days after the alleged unlawful employment practice occurred, or within thirty days after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier, and a copy of such charge shall be filed by the Commission with the State or local agency.

(2) For purposes of this section, an unlawful employment practice occurs, with respect to a seniority system that has been adopted for an intentionally discriminatory purpose in violation of this subchapter (whether or not that discriminatory purpose is apparent on the face of the seniority provision), when the seniority system is adopted, when an individual becomes subject to the seniority system, or when a person aggrieved is injured by the application of the seniority system or provision of the system.

(f) Civil action by Commission, Attorney General, or person aggrieved; preconditions; procedure; appointment of attorney; payment of fees, costs, or security; intervention; stay of Federal proceedings; action for appropriate temporary or preliminary relief pending final disposition of charge; jurisdiction and venue of United States courts; designation of judge to hear and determine case; assignment of case for hearing; expedition of case; appointment of master

(1) If within thirty days after a charge is filed with the Commission or within thirty days after expiration of any period of reference under subsection (c) or (d) of this section, the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission may bring a civil action against any respondent not a government, governmental agency, or political subdivision named in the charge. In the case of a respondent which is a government, governmental agency, or political subdivision, if the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission shall take no further action and shall refer the case to the Attorney General who may bring a civil action against such respondent in the appropriate United States district court. The person or persons aggrieved shall have the right to intervene in a civil action brought by the Commission or the Attorney General in a case involving a government, governmental agency, or political subdivision. If a charge filed with the Commission pursuant to subsection (b) of this section is dismissed by the Commission, or if within one hundred and eighty days from the filing of such charge or the expiration of any period of reference under subsection (c) or (d) of this section, whichever is later, the Commission has not filed a civil action under this section or the Attorney General has not filed a civil action in a case involving a government, governmental agency, or political subdivision, or the Commission has not entered into a conciliation agreement to which the person aggrieved is a party, the Commission, or the Attorney General in a case involving a

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government, governmental agency, or political subdivision, shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge (A) by the person claiming to be aggrieved or (B) if such charge was filed by a member of the Commission, by any person whom the charge alleges was aggrieved by the alleged unlawful employment practice. Upon application by the complainant and in such circumstances as the court may deem just, the court may appoint an attorney for such complainant and may authorize the commencement of the action without the payment of fees, costs, or security. Upon timely application, the court may, in its discretion, permit the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, to intervene in such civil action upon certification that the case is of general public importance. Upon request, the court may, in its discretion, stay further proceedings for not more than sixty days pending the termination of State or local proceedings described in subsections[2] (c) or (d) of this section or further efforts of the Commission to obtain voluntary compliance.

(2) Whenever a charge is filed with the Commission and the Commission concludes on the basis of a preliminary investigation that prompt judicial action is necessary to carry out the purposes of this Act, the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, may bring an action for appropriate temporary or preliminary relief

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[2] So in original. Probably should be "subsection".

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pending final disposition of such charge. Any temporary restraining order or other order granting preliminary or temporary relief shall be issued in accordance with rule 65 of the Federal Rules of Civil Procedure. It shall be the duty of a court having jurisdiction over proceedings under this section to assign cases for hearing at the earliest practicable date and to cause such cases to be in every way expedited.

(3) Each United States district court and each United States court of a place subject to the jurisdiction of the United States shall have jurisdiction of actions brought under this subchapter. Such an action may be brought in any judicial district in the State in which the unlawful employment practice is alleged to have been committed, in the judicial district in which the employment records relevant to such practice are maintained and administered, or in the judicial district in which the aggrieved person would have worked but for the alleged unlawful employment practice, but if the respondent is not found within any such district, such an action may be brought within the judicial district in which the respondent has his principal office. For purposes of sections 1404 and 1406 of Title 28, the judicial district in which the respondent has his principal office shall in all cases be considered a district in which the action might have been brought.

(4) It shall be the duty of the chief judge of the district (or in his absence, the acting chief judge) in which the case is pending immediately to designate a judge in such district to hear and determine the case. In the event that no judge in the district is available to hear and determine the case, the chief judge of the district, or the

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acting chief judge, as the case may be, shall certify this fact to the chief judge of the circuit (or in his absence, the acting chief judge) who shall then designate a district or circuit judge of the circuit to hear and determine the case.

(5) It shall be the duty of the judge designated pursuant to this subsection to assign the case for hearing at the earliest practicable date and to cause the case to be in every way expedited. If such judge has not scheduled the case for trial within one hundred and twenty days after issue has been joined, that judge may appoint a master pursuant to rule 53 of the Federal Rules of Civil Procedure.

(g) Injunctions; appropriate affirmative action; equitable relief; accrual of back pay; reduction of back pay; limitations on judicial orders

(1) If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission. Interim earnings or

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amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable.

(2)(A) No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of section 2000e-3(a) of this title.

(B) On a claim in which an individual proves a violation under section 2000e-2(m) of this title and a respondent demonstrates that the respondent would have taken the same action in the absence of the impermissible motivating factor, the court –

(i) may grant declaratory relief, injunctive relief (except as provided in clause (ii)), and attorney's fees and costs demonstrated to be directly attributable only to the pursuit of a claim under section 2000e-2(m) of this title; and

(ii) shall not award damages or issue an order requiring any admission, reinstatement, hiring, promotion, or payment, described in subparagraph (A).

(h) Provisions of chapter 6 of Title 29 not applicable to civil actions for prevention of unlawful practices

The provisions of chapter 6 of Title 29 shall not apply with respect to civil actions brought under this section.

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(i) Proceedings by Commission to compel compliance with judicial orders

In any case in which an employer, employment agency, or labor organization fails to comply with an order of a court issued in a civil action brought under this section, the Commission may commence proceedings to compel compliance with such order.

(j) Appeals

Any civil action brought under this section and any proceedings brought under subsection (i) of this section shall be subject to appeal as provided in sections 1291 and 1292, Title 28.

(k) Attorney's fee; liability of Commission and United States for costs

In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee (including expert fees) as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person.

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UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE (NAACP) AND NEW HAVEN BRANCH NAACP	:	Docket No. 3:93CV01050 (PCD)
-vs-	:	
TOWN OF EAST HAVEN AND EAST HAVEN BOARD OF EDUCATION	:	

DECREE

(Filed June 10, 1998)

This Decree shall implement the Memorandum of Decision dated March 25, 1998 (Memorandum) and shall be incorporated into the Judgment herein.

PURPOSE:

The purpose hereof, implementing the Memorandum shall be:

1) To attract qualified African-American employment applicants, in numbers reasonably representative of the African-American community in the relevant labor market, balancing the effort to eliminate historical adverse impact on African-American employment by defendants without requiring employment of persons unqualified for particular jobs.

2) To dispel any African-Americans' concept that an application for employment by defendants will

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not be judged solely in relation to reasonably established job qualification.

3) To assure African-Americans that any application for Employment by defendants will be considered on its merits and without consideration of race or discriminatory animus.

4) To instill in African-Americans confidence that any African-American employed by defendants will be treated equally, without consideration of race or discriminatory animus.

5) To instill in African-Americans confidence that all employment practices, decisions, actions and relations affecting employment by and employees of defendants will be guided by and strictly compliant with the law and free from discrimination.

6) To insure full knowledge of and compliance herewith by defendants' agents, servants, employees and representatives and any and all persons or legal entities who act, purport to act or are in any manner authorized to act for, on behalf of or in the interest of either defendant in a decision making role.

7) To encourage qualified African-Americans to apply for employment by defendants through awareness of their job availabilities.

PRACTICES/CONDUCT:

In furtherance of and to achieve those purposes, to assure compliance with the law and to avoid any discrimination by or on behalf of defendants, including by any and all agents, servants and employees of defendants in

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employment practices, decisions, actions and relations, defendants shall:

1) Advertise all employment availability to maximize the African-American Community's job opportunity awareness by:

a) Advertising all employment availability in/on media generally, media oriented to particular fields of employment as is pertinent and in media with maximum entree, readership and audience in the African-American community within the relevant labor market.

b) Listing the publications and electronic media referred to in a), and used and intended to be used, in consultation with plaintiffs and civic, church and social organizations actively involved in the African-American community. Such lists will be reasonably available for public inspection in the EEO office.

c) Posting notices of employment availability in public places such as stores, shopping centers, schools, Town buildings, public and private agencies and with African-American civic, church and social organizations. The EEOO shall maintain a list of such notification and posting in consultation with plaintiffs and African-American community civic, church and social organizations.

d) Including in each such advertisement, notice and posting, placed conspicuously, the following:

"MINORITIES, FEMALES, HANDICAPPED AND VETERANS ARE ENCOURAGED TO APPLY. EAST HAVEN IS AN EQUAL OPPORTUNITY EMPLOYER."

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e) Obtaining from applicants identification of the means and methods of advertising and recruitment most effectively prompting African-American applications.

2) Develop, administer and grade employment interviews, tests and other screening processes to identify the person(s) most completely qualified for the job(s) in question, taking reasonable care and precaution to avoid discriminatory animus and/or effect and factors irrelevant to qualification in selecting each employee, complying with the Uniform Guidelines for Employee Selection Procedures, 29 C.F.R. § 1607.4 and screening from all involved in testing, evaluating and appointing applicants record reflections of applicants' race and national origin.

3) Permit plaintiffs, on request, to review any validity studies of proposed tests, to avoid tests reasonably likely to result in adverse impact on African-American applicants.

4) To the extent reasonably available and practicable, consult with independent testing agencies in determining, scoring and administering tests of employment applicants.

5) Avoid and neither permit or use employment practices, including collective bargaining agreement provisions, political affiliation nor residence, which unreasonably and unnecessarily preclude or impede merit selection of employees from all qualified applicants free of any actual or semblance of discrimination.

6) Communicate with the African-Community through church, civic and social organizations, their leaders and members, to promote mutual understanding,

community harmony and resolution of matters of mutual interest and concern pertaining to employment.

7) Assist any employee who is reasonably subject to a residence requirement due to the responsibilities and nature of a position by affording him/her a reasonable time to arrange such residence and by aiding in arranging a compliant residence.

8) Cause the Equal Employment Opportunity Officer (EEOO) to keep and maintain for five (5) years records of all job applications and appointments, test scores, interview reports and evaluations, and statistics reflective of such records by race, national origin, gender and residence, requiring all appointing officers, departments, offices, agencies and the Civil Service Commission to cooperate with the EEOO and provide all information and material required for compliance herewith by the EEOO.

9) File as of December 31, 1998, June 30, 1999, December 31, 1999 and annually thereafter a report of the prior year's actions in compliance with this decree with the EEOO and listing appointees by name, residence, race, and residence.

10) Make available the records and reports required hereby for public inspection in normal business hours.

11) Receive and consider all suggested modification of the employment practices, recruiting, advertising, posting, application processing, testing, evaluation and other actions required hereby or reasonably necessary to comply herewith, from plaintiffs and any church,

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civic and social organization which concerns itself with employment of African-Americans.

12) Designate an EEOO, adequately funded and supported logistically, who shall be available during all business hours, shall keep informed of and monitor and review compliance herewith in all hiring and shall recommend alternative methods by which the purpose of increased employment applications by African-Americans may be more effectively and fairly achieved.

13) Cause the EEOO to summarize for each position filled the number of original applicants and at each stage of the process by race and residence, certify the processing for compliance herewith to the appointing officer or agency and Mayor, report deficiencies to the School Superintendent and/or Mayor and recommend appropriate rectification.

14) Withhold appointment of any applicant until the EEOO certifies compliance herewith in determining such appointment.

15) Keep and maintain, by department, a roster listing each employee's position/title, date of appointment, initial appointment date, race, residence at appointment and type of employment (full-time, part-time, temporary, seasonal).

16) For each position filled other than by assessment of comparative merit, cause the development and promulgation of standards and guidelines for filling each such position to maximize compliance herewith and to avoid and preclude any consideration of race or residence, maintain a pool of persons interested in each such

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position, publishing information as to the availability of such positions in accordance herewith, maintain records related thereto required hereby and include information related thereto in all reports required hereby.

17) Participate reasonably in job fairs, career, guidance placement, and employment programs sponsored by schools, colleges, government and private agencies and civic organizations.

The parties hereto shall meet at the request of a party, after ninety (90) days and not more frequently than semi-annually, to assess the effectiveness and results of defendants' compliance herewith, to review defendants' plans to achieve such compliance and to discuss alternatives thereto.

The parties hereto may move for modification of this decree to assure and improve compliance with the letter and spirit of this decree and the Memorandum or to relieve any party of obligations which become no longer reasonably necessary to comply with the letter and spirit of this decree and the Memorandum, provided however before any such motion is filed, the movant shall have consulted with all other parties in an effort to resolve any modification proposal amicably. Any such motion shall be accompanied by a certification of such effort. Any modification agreed to by the parties may be filed with the clerk.

Plaintiffs shall advise the EEOO in writing of any change in address for their receipt of notices and communications from that of counsel now on record with the court.

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This court shall retain jurisdiction of this case, though it be closed administratively by the Clerk, for enforcement or modification of this Decree on motion of any party.

The parties hereto shall make no public subjective comment pertaining to any other party to this decree nor their conduct in relation to it nor their compliance herewith and shall make every reasonable effort to insure that similar restraint is exercised by their agents servants, employees and representatives.

This Decree shall expire on June 30, 2003 unless:

a) on motion of plaintiffs, on a showing that its extension is reasonably necessary for achievement of the purposes hereof, its term shall be extended, or;

b) on motion of defendants, on a showing that its purposes have been substantially achieved, its term is shortened.

SO ORDERED.

Dated at New Haven, Connecticut, June 10, 1998.

/s/ Peter C. Dorsey
PETER C. DORSEY
United States District Judge

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